No. 93-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
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TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court for the District of Columbia

JOINT APPENDIX

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DATE	PROCEEDINGS
10/5/92	Complaint filed in 92-2247
10/13/92	Complaint filed in 92-2292
11/5/92	Complaints filed in 92-2494 & 92-2495
11/5/92	Motion for summary judgment filed by Plaintiff Daniels Cablevision
11/13/92	Complaint filed in 92-2558
11/23/92	ORDER by Judge Thomas P. Jackson: consolidating cases
11/24/92	Response by FCC to Daniels Cablevision motion for Summary Judgment
2/12/93	Motions, Cross-Motions and Oppositions for Summary Judgment filed by all parties, along with Statements of Material Facts
2/19/93	Replys in Support or Opposition to Motions, Cross-Motions and Oppositions to Summary Judgment filed by all parties
2/25/93	Responses to Statements of Material Facts filed by all parties
3/4/93	Motion Hearing before Judges Thomas P. Jackson, Stephen Williams and Stanley Sporkin, Plaintiffs motions for summary judgment, Defendants motions to dismiss, Intervenor-Plaintiff NICC motion for Preliminary Injunction, and Cross Claim by Intervenor-defendant CBA heard and taken under advisement.
3/11/93	Responses by movant Public Broadcasting and by Defendant FCC to (revised) motion for Summary Judgment by The Learning Channel, Discovery Communications
3/31/93	Notice of Filing by Defendant FCC of the Regulations implementing the Must-Carry provisions of the 1992 Act

DATE	PROCEEDINGS
3/31/93	Response (Oppositions) by Defendant FCC to submission of supplemental authority bearing upon the Must-Carry requirements of the 1992 Cable Act
4/8/93	MEMORANDUM and ORDER by Circuit Judge Stephen F. Williams, Judge Thomas P. Jackson, Judge Stanley Sporkin, Concurring Opinion of Judge Stanley Sporkin, Dissenting Opinion of Circuit Judge Stephen F. Williams, denying plaintiffs motions for Summary Judgment on must-carry claims, granting federal defendants motion to dismiss the must-carry claims, denying motion of intervenor-defendant Local Community Broadcasters for Summary Judgment on cross claim, dismissing with prejudice complaints of plaintiffs and intervenor-plaintiffs as they challenge as unconstitutional sections 4, 5, of Cable Act, dismissing with prejudice complaints challenging section 6 of the Cable Act, dismissing with prejudice cross claim of intervenor defendant Local Community Broadcasters, and denying and dismissing as moot all other pending motions relating to constitutionality of sections 4, 5 of Cable Act
5/3/93	Notices of Appeal filed by all parties
10/4/93	Letter from Supreme Court noting Probable Jurisdiction

Public Law 102-385 [S. 12]; October 5, 1992

CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

An Act to amend the Communications Act of 1934 to provide increased consumer protection and to promote increased competition in the cable television and related markets, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

Sec. 2. Findings; Policy; Definitions.

(a) FINDINGS.—The Congress finds and declares the following:

(1) Pursuant to the Cable Communications Policy Act of 1984, rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986. Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation.

(2) For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distribu-

tor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

(3) There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium.

(4) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

(6) There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.

(7) There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations which Congress has authorized, as expressed

in section 396(a)(5) of the Communications Act of 1934. The distribution of unique noncommercial, educational programming services advances that interest.

(8) The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because—

(A) public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;

(B) public television is a local community institution, supported through local tax dollars and voluntary citizen contributions in excess of $10,800,000,000 since 1972, that provides public service programming that is responsive to the needs and interests of the local community;

(C) the Federal Government, in recognition of public television's integral role in serving the educational and informational needs of local communities, has invested more than $3,000,000,000 in public broadcasting since 1969; and

(D) absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.

(9) The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.

(10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

(11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

(12) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

(14) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast

signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(16) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

(17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot othewise receive broadcast television services. The regulatory system created by the Cable Communications Policy Act of 1984 was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems.

(18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

(19) At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off-the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.

(20) The Cable Communications Policy Act of 1984, in its amendments to the Communications Act of 1934, limited the regulatory authority of franchising authorities over cable operators. Franchising authorities are finding it difficult under the current regulatory scheme to deny renewals to cable systems that are not adequately serving cable subscribers.

(21) Cable systems should be encouraged to carry low-power television stations licensed to the communities served by those systems where the low-power station creates and broadcasts, as a substantial part of it programming day, local programming.

(b) STATEMENT OF POLICY.—It is the policy of the Congress in this Act to—

(1) promote the availability to the public of a diversity of views and information through cable

television and other video distribution media;

(2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;

(3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;

(4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and

(5) ensure that cable television operators do not have undue market powers vis-a-vis video programmers and consumers.

(c) DEFINITIONS.—Section 602 of the Communications Act of 1934 (47 U.S.C. 531) is amended—

(1) by redesignating paragraph (16) as paragraph (19);

(2) by striking "and" at the end of paragraph (15);

(3) by redesignating paragraphs (11) through (15) as paragraphs (13) through (17), respectively;

(4) by redesignating paragraphs 1 through (10) as paragraphs (2) through (11), respectively;

(5) by inserting before paragraph (2) (as so redesignated) the following new paragraph:

"(1) the term 'activated channels' means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;";

(6) by inserting after paragraph (11) (as so redesignated) the following new paragraph:

"(12) the term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;"; and

(7) by inserting after paragraph (17) (as so redesignated) the following new paragraph:

"(18) the term 'usable activated channels' means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission; and".

* * * * *

Sec. 4. Carriage of Local Commercial Television Signals.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 613 (47 U.S.C. 533) the following new section:

"Sec. 614. Carriage of Local Commercial Television Signals.

"(a) CARRIAGE OBLIGATIONS.—Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b).

"(b) SIGNALS REQUIRED.—

"(1) IN GENERAL.—(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

"(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

"(2) SELECTION OF SIGNALS.—Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that—

"(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

"(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

"(3) CONTENT TO BE CARRIED.—(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompany-

ing audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking internal or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

"(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

"(4) SIGNAL QUALITY.—

"(A) NONDEGRADATION; TECHNICAL SPECIFICATIONS.—The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

"(B) ADVANCED TELEVISION.—At such time as the Commission prescribes modifications of

the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

"(5) DUPLICATION NOT REQUIRED.—Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

"(6) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a

local commercial television station shall be resolved by the Commission.

"(7) SIGNAL AVAILABILITY.—Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).

"(8) IDENTIFICATION OF SIGNALS CARRIED.—A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

"(9) NOTIFICATION.—A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(10) COMPENSATION FOR CARRIAGE.—A cable operator shall not accept or request monetary payment or other valuable consideration in exchange

either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that—

"(A) any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

"(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of title 17, United States Code, as indemnification for any increased copyright liability resulting from carriage of such signal; and

"(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

"(c) LOW POWER STATION CARRIAGE OBLIGATION.—

"(1) REQUIREMENT.—If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b)—

"(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

"(B) a cable operator of a cable system with a capacity of more than 35 usable activated

channels shall be required to carry two qualified low power stations.

"(2) USE OF PUBLIC, EDUCATIONAL, OR GOVERNMENTAL CHANNELS.—A cable operator required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

"(d) REMEDIES.—

"(1) COMPLAINTS BY BROADCAST STATIONS.—Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section. The cable operator shall, within 30 days of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall afford such cable operator an opportunity

to present data and arguments to establish that there has been no failure to meet its obligations under this section.

"(3) REMEDIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the requirements of this section, it shall dismiss the complaint.

"(e) INPUT SELECTOR SWITCH RULES ABOLISHED.—No cable operator shall be required—

"(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device; or

"(2) to provide information to subscribers about input selector switches or comparable devices.

"(f) REGULATIONS BY COMMISSION.—Within 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

"(g) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS.—

"(1) CARRIAGE PENDING PROCEEDING.—Pending the outcome of the proceeding under paragraph (2),

nothing in this Act shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

"(2) PROCEEDING CONCERNING CERTAIN STATIONS. Within 270 days after the date of enactment of this section, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportunity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a). In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because

their programming consisted predominantly of sales presentations or program length commercials.

"(h) DEFINITIONS.—

"(1) LOCAL COMMERCIAL TELEVISION STATION.—

"(A) IN GENERAL.—For purposes of this section, the term 'local commercial television station' means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

"(B) EXCLUSIONS.—The term 'local commercial television station' shall not include—

"(i) low power television stations, television translator stations, and passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

"(ii) a television broadcast station that would be considered a distant signal under section 111 of title 17, United States Code, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

"(iii) a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of —45dBm for UHF signals or—49dBm for VHF signals at the input terminals of the signal processing equipment, if such station

does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

"(C) MARKET DETERMINATIONS.—(i) For purposes of this section, a broadcasting station's market shall be determined in the manner provided in section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991, except that, following a written request, the Commission may with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

"(ii) In considering requests filed pursuant to clause (i) the Commission shall afford particular attention to the value of localism by taking into account such factors as—

"(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

"(II) whether the television station provides coverage or other local service to such community;

"(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or

coverage of sporting and other events of interest to the community; and

"(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

"(iii) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

"(iv) In the rulemaking proceeding required by subsection (f), the Commission shall provide for expedited consideration of requests filed under this subparagraph.

"(2) QUALIFIED LOW POWER STATION.—The term 'qualified low power station' means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if—

"(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations;

"(B) such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news

and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

"(C) such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

"(D) such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

"(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such date did not exceed 35,000; and

"(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on the date of enactment of this section.".

Sec. 5. Carriage of Noncommercial Stations.

Part II of title VI of the Communications Act of 1934 (47 U.S.C. 531 et seq.) is further amended by inserting after section 614 (as added by section 4 of this Act) the following new section:

"Sec. 615. Carriage of Noncommercial Educational Television.

"(a) CARRIAGE OBLIGATIONS.—In addition to the carriage requirements set forth in section 614, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.

"(b) REQUIREMENTS TO CARRY QUALIFIED STATIONS.—

"(1) GENERAL REQUIREMENT TO CARRY EACH QUALIFIED STATION.—Subject to paragraphs (2) and (3) and subsection (e), each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television station requesting carriage.

"(2)(A) SYSTEMS WITH 12 OR FEWER CHANNELS.—Notwithstanding paragraph (1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station; except that a cable operator of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

"(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—

"(i) the cable operator shall import and carry on that system the signal of one qualified noncommercial educational television station;

"(ii) the selection for carriage of such a signal shall be at the election of the cable operator; and

"(iii) in order to satisfy the requirements for carriage specified in this subsection, the cable operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such cable operator shall use the first channel available to satisfy the requirements of this subparagraph.

"(3) SYSTEMS WITH 13 TO 36 CHANNELS.—(A) Subject to subsection (c), a cable operator of a cable system with 13 to 36 usable activated channels—

"(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

"(ii) may, in its discretion, carry additional such stations.

"(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the cable operator shall import and carry on that system the signal of at least one qualified noncommercial educational television station to comply with subparagraph (A)(i).

"(C) The cable operator of a cable system described in this paragraph which carriers the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional qualified local noncommercial educational television stations affiliated with the same network if the programming of such additional stations is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.

"(D) A cable operator of a system described in this paragraph which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990, shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).

"(c) CONTINUED CARRIAGE OF EXISTING STATIONS.—Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular cable operator and a particular such station, upon the written consent of the cable operator and the station.

"(d) PLACEMENT OF ADDITIONAL SIGNALS.—A cable operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.

"(e) SYSTEMS WITH MORE THAN 36 CHANNELS.—A cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.

"(f) WAIVER OF NONDUPLICATION RIGHTS.—A qualified local noncommercial educational television station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that cable operator.

"(g) CONDITIONS OF CARRIAGE.—

"(1) CONTENT TO BE CARRIED.—A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.

"(2) BANDWIDTH AND TECHNICAL QUALITY.—A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.

"(3) CHANGES IN CARRIAGE.—The signal of a qualified local noncommercial educational television station shall not be repositioned by a cable operator unless the cable operator, at least 30 days in advance of such repositioning, has provided written notice to

the station and all subscribers of the cable system. For purposes of this paragraph, repositioning includes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(4) GOOD QUALITY SIGNAL REQUIRED.—Notwithstanding the other provisions of this section, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission.

"(5) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the qualified local noncommercial educational television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a qualified local noncommercial educational television station shall be resolved by the Commission.

"(h) AVAILABILITY OF SIGNALS.—Signals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier

that includes the retransmission of local commercial television broadcast signals.

"(i) PAYMENT FOR CARRIAGE PROHIBITED.—

"(1) IN GENERAL.—A cable operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial educational television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system.

"(2) DISTANT SIGNAL EXCEPTION.—Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection (c), where such signal would be considered a distant signal for copyright purposes unless such station indemnifies the cable operator for any increased copyright costs resulting from carriage of such signal.

"(j) REMEDIES.—

"(1) COMPLAINT.—Whenever a qualified local noncommercial educational television station believes that a cable operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall afford such cable operator an opportunity to present data, views, and arguments to establish

that the cable operator has complied with the signal carriage requirements of this section.

"(3) REMEDIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the cable operator has complied with the requirements of this section. If the Commission determines that the cable operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the cable operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the cable operator has fully complied with such requirements, the Commission shall dismiss the complaint.

"(k) IDENTIFICATION OF SIGNALS.—A cable operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.

"(l) DEFINITIONS.—For purposes of this section—

"(1) QUALIFIED NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified noncommercial educational television station' means any television broadcast station which—

"(A)(i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and

"(ii) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B); or

"(B) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

Such term includes (I) the translator of any noncommercial educational television station with five watts or higher power serving the franchise area, (II) a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations.

"(2) QUALIFIED LOCAL NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified local noncommercial educational television station' means a qualified noncommercial educational television station—

"(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or

"(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system.".

Sec. 6. Retransmission Consent for Cable Systems.

Section 325 of the Communications Act of 1934 (47 U.S.C. 325) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting immediately after subsection (a) the following new subsection:

"(b)(1) Following the date that is one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—

"(A) with the express authority of the originating station; or

"(B) pursuant to section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

"(2) The provisions of this subsection shall not apply to—

"(A) retransmission of the signal of a noncommercial broadcasting station;

"(B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;

"(C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household; or

"(D) retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.

For purposes of this paragraph, the terms 'satellite carrier', 'superstation', and 'unserved household' have the

meanings given those terms, respectively, in section 119 (d) of title 17, United States Code, as in effect on the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

"(3)(A) Within 45 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614, and such other regulations as are necessary to administer the limitations contained in paragraph (2). The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable. Such rulemaking proceeding shall be completed within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

"(B) The regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 614. If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.

"(4) If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not

apply to the carriage of the signal of such station by such cable system.

"(5) The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under section 614 or 615 of any station electing to assert the right to signal carriage under that section.

"(6) Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247
(Three-Judge Court)

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Plaintiffs

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

UNITED STATES OF AMERICA,
Defendants

AFFIDAVIT OF THOMAS F. BURCHILL

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

Thomas F., Burchill, being duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of Hearst/ABC-Viacom Entertainment Services ("HAVES"). I make this affidavit in support of the plaintiff's application for a preliminary injunction.

2. HAVES is a joint venture operating as a partnership under the laws of the State of New York. Among HAVES' owners are The Hearst Corporation, Capital Cities/ABC Inc. and Viacom International, Inc.

3. HAVES offers television programming for exhibition to viewers primarily over the facilities of cable system operators on its television program service called

The Lifetime Television Network ("Lifetime"). Lifetime is a 24-hour per day service offering original and previously produced television programs of particular interest to women six days per week (Monday through Saturday). On the seventh day (Sunday), Lifetime offers Lifetime Medical Television ("LMT"), the world's foremost provider of television programs produced for medical professionals.

4. Lifetime began operation in February of 1984 as a result of the combination of two earlier unsuccessful programming services, Daytime and The Cable Health Network. At its inception, Lifetime was available to approximately 17 million subscribers and as of September 30, 1992, is available to over 58 million subscribers.

5. Lifetime is made available to viewers primarily through cable television operators. The cable operators receive or originate television signals from different sources and retransmit such signals to subscribers over coaxial and fiber optic cables. Operators select the programming to offer to their subscribers from sources including local television broadcast stations, distant television broadcast stations, locally originated cable programming, and cable network programming, such as Lifetime.

6. Lifetime is part of the diversity in program offerings that has been made available to American viewers in recent years as a result of the growth of the cable industry infrastructure and the development of far-reaching satellite-based distribution system. This diversity in program offerings, especially niche services such as Lifetime, could not be achieved through mass media oriented over-the-air broadcast stations.

7. One characteristic of Lifetime's programming which distinguishes it from its competitors is its relatively high percentage of original programming, i.e., pro-

grams either first available on Lifetime or available on no other program service in the United States. This favorable mix of original to acquired product is of great value to Lifetime in its efforts to expand its circulation by reaching agreements for carriage with currently non-affiliated cable operators. At its inception, Lifetime offered only 33% original programming, while it currently projects that it will offer 50% original programming in 1993.

8. Through the end of 1992, Lifetime's total programming investment has grown almost tenfold since its commencement. Its investment in original programming has grown by a comparable amount in the same period. This spectacular growth has been possible in part due to the growth in Lifetime's subscriber base and the willingness of its affiliates to stand behind Lifetime's programming efforts.

9. Since the enactment into law of the Cable Television Consumer Protection Act of 1992 (the "Act"), Lifetime's ongoing effort of retaining and expanding its universe of subscribers has met with resistance from cable operators which are concerned about the application of the Act to their operations. For instance, Lifetime has been advised that operators are more inclined to invest in non-programming related areas of their business rather than in new programming, because there are no regulatory impediments in those areas and no uncertainty in the law. The consequence of this investment decision is that Lifetime may not be able to amass enough capital to continue to increase the amount of original programming it offers.

10. The must carry requirements embodied in Sections 4 and 5 of the Act will most likely visit harm to Lifetime in other respects. The ability of Lifetime to market its service to potential advertisers will be impaired because of the right of broadcast stations,

including low power stations and non-commercial educational stations, to require carriage on cable systems and, in some instances, to demand favorable channel placement. Moreover, cable channel capacity is a scarce commodity. Accordingly, Lifetime may be required to forfeit existing channel positions completely or to be moved to a higher numbered channel which will reduce the likelihood of viewership. The loss of viewers which would occur in these circumstances would make Lifetime a far less attractive advertising vehicle that it currently is.

11. Channel positions are important to broadcast and cable networks. For example, all telecasters seek to develop viewer association through their channel position and for new networks, being placed near well-established or popular channels will tend to lead to sampling by viewers or exposure to program offerings that can lead to viewer acceptance. Also, technological characteristics of some television receivers make certain channel positions more desirable. So to grant over-the-air telecasters the right to oust previously placed cable programmers, without regard to viewer preference or the broadcasters' prior history of carriage in the community served by them is a manifest injustice to any affected cable programmer.

12. The right of over-the-air telecasters to require their consent to the retransmission of their signals will further jeopardize the ability of Lifetime to produce additional original programming. To the extent that consideration will be paid to over-the-air programmers, that consideration will most likely come from amounts available to cable services such as Lifetime, reducing the viewing public's access to additional product. Especially vulnerable would be highly targeted programs and other socially redeeming programming which often are not able to attract sufficient advertiser support to warrant production.

13. Under the must carry and retransmission consent provisions of the Act (i.e., sections 4, 5 and 6), broadcast stations are granted a clear preference over their cable competitors. Regardless of the public interest or lack thereof in their program content, over-the-air broadcasters are given the power to oust comparable cable programmers from the offerings of cable operators for no reason other than the legislative advantage embodied in the Act. The legislative history of the Act strongly suggests that Congressional intent is to enhance the diversity of program offerings available to the viewer. This worthy goal will be frustrated if in the implementation of the must carry requirements the number of programming choices is decreased due to the loss of viewer access to alternative cable services.

This 4th day of November, 1992

/s/ Thomas F. Burchill
THOMAS F. BURCHILL

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF NATIONAL CABLE SATELLITE CORPORATION, d/b/a C-SPAN IN SUPPORT OF COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BRUCE D. COLLINS, makes this affidavit and states:

1. I am Bruce D. Collins, an attorney authorized to make this Affidavit on behalf of National Cable Satellite Corporation, d/b/a C-SPAN ("NCSC").

Background of NCSC

2. NCSC is a non-profit corporation organized in 1978 under the laws of the District of Columbia, and located at Suite 650, 400 North Capitol Street, Washington, D.C. 20001, and has been recognized by the Internal Revenue Service as exempt from the payment of federal income tax pursuant to I.R.C. Sec. 501(c)(3).

3. NCSC was created and continues to be funded exclusively by cable television operators as an independent journalistic organization. As such, NCSC receives no taxpayer funds of any kind, and has no legal connection to, or any legal relationship with any agency of government at any level, including the United States Congress.

4. NCSC is the producer and the exclusive distributor of the two information and public affairs television networks known as C-SPAN and C-SPAN 2. The two programming services are available on a 24-hour per day basis via cable television and are devoted entirely to in-

formation and public affairs programming, including the live gavel-to-gavel coverage of the proceedings of both the U.S. House of Representatives (on C-SPAN) and the U.S. Senate (on C-SPAN 2), and a variety of other events at public forums around the country and the world (see Exhibit A). Each program on C-SPAN and C-SPAN 2 is provided to the viewer in its entirety, and without editorial comment or analysis.

5. The C-SPAN network is available to 58 million cable television subscribers, representing 62% of all television households in the U.S. The C-SPAN 2 network is available to 29 million cable television subscribers, representing 31% of all television households in the U.S.

6. Since 1989 NCSC has also distributed via cable television the C-SPAN Audio Networks containing international radio broadcasts and historical programming drawn from the National Archives. The two networks, C-SPAN Audio 1 and C-SPAN Audio 2 are available to 5.7 million television households in the U.S.

NCSC's Status as a First Amendment Speaker

7. NCSC bylaws provide that the powers of its cable television operator board of directors are limited to the business affairs of the corporation. Full authority for NCSC editorial policies is reserved exclusively to the staff.

8. NCSC's full-length carriage of the proceedings of the U.S. House of Representatives and of the U.S. Senate is voluntary, and is motivated solely by the public service mission of the corporation. NCSC has no agreement with either the House or the Senate with respect to such carriage, nor was the commencement of such carriage prompted or otherwise motivated by any government regulation.

9. By exercising a significant amount of editorial discretion regarding the types of programming offered by C-SPAN, C-SPAN 2, and the C-SPAN Audio Networks,

the NCSC staff is engaged in conduct protected by the First Amendment.

The Must Carry Rules Brand C-SPAN as "Less Worthy"

10. Sections 4 and 5 (the must carry provisions) of the Cable Television Consumer Competition and Protection Act of 1992 ("the Act") grant an unwarranted and unsupported preference to all broadcasters over all cable programming services in the allocation of a limited number of available channels on a cable system. Such impermissible governmental action effectively brands C-SPAN's public affairs programming as less worthy of access to the public through cable systems than any other programming that any broadcast licensee might care to put on the electromagnetic spectrum.

11. The wisdom of the First Amendment's declaration that "The Congress shall make no law. . . ." regarding the freedom of speech is apparent, given the harmful consequences of the proposed must carry rules on C-SPAN's public service programming, especially with respect to the Act's own stated policy goal of promoting the "availability to the public of a diversity of views and information through cable television and other video distribution media."

12. Through the must carry provisions of the Act, the government is telling the local cable operator in many instances that C-SPAN and C-SPAN 2 must take a back seat for a channel position on the cable system to *any* broadcast licensee, regardless of its programming or even the extent to which it is viewed locally. The effect will be that a cable operator could, and likely would, be forced to substitute a shopping channel or a barely-viewed low-power broadcast station for C-SPAN or C-SPAN 2. NCSC submits that, given the realities of today's video marketplace, not only would NCSC's First Amendment rights be compromised by that result, the Act's stated goal of 'diversity of information' would not be served.

13. The First Amendment prohibits restricting speech based on the government's judgement of the worthiness or value of that speech. In establishing preferential access to cable subscribers for broadcast licensees over cable programmers, the must carry provisions of the Act restrict NCSC's First Amendment rights.

Must Carry Could Mean "Less Carry" for C-SPAN

14. The enforcement of Sections 4 and 5 of the Act could mean that C-SPAN and C-SPAN 2 will be available to fewer American television households. Like any other video programmer (broadcast or cable), NCSC competes for channel space on the finite number of channels available in each cable system. The enforcement of the must carry rules will mean that NCSC will have to compete for fewer available channels. In some small- to medium-sized cable systems that now carry C-SPAN or C-SPAN 2, the operator will be forced, due to the must carry rule, to drop some cable programming services. C-SPAN and C-SPAN 2 will be at an economic disadvantage when that choice is made, because unlike many cable programming services that generate revenue for the cable operator, the NCSC services are a direct cost.

15. Given the growth in the number of video services, and the creation of new services that will take up channel capacity in the future, C-SPAN and C-SPAN 2 will face increasing competition for channel capacity, and such competition will likely extend beyond the smaller markets into the mid-sized and larger markets. While NCSC is willing to face such competition in a free market, it is unwilling to accept unfair competition in the form of the government siding with any and all broadcast licensees in the competition for limited channel capacity to NCSC's detriment.

16. C-SPAN 2, which is the only distributor of the daily proceedings of the U.S. Senate, has experienced a healthy growth in carriage by cable systems in recent

years. The artificial shortage of cable channels available to cable programmers created by the must carry rule will have the effect of retarding the growth of C-SPAN 2's audience reach, if not actually reducing it. C-SPAN 2 is particularly vulnerable because, unlike C-SPAN, it is carried on a part-time basis in many systems. In general, part-time programming services are perceived by cable operators as having less value to audiences than full-time services. Due to the artificial shortage of channels available to cable programmers created by the must-carry rules, C-SPAN 2 will be worse off in the competition for cable system access.

17. In some cable systems, the reduced number of channels available to cable programmers would place pressure on NCSC to accept part-time carriage of C-SPAN in response to cable operator desires to avoid dropping C-SPAN's public affairs programming altogether. Given NCSC's standing as a First Amendment speaker, and its commitment to the gavel-to-gavel coverage of public affairs events (particularly the daily proceedings of the U.S. House of Representatives) it is loath to accept such a crude and editorially blunt restraint on its speech. However, the reality of the marketplace is such that the artificial shortage of cable channels available to C-SPAN as a cable programming service, could force NCSC to restrain its speech in such a fashion in order to maintain its business viability.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 3rd day of November, 1992.

/s/ Bruce D. Collins, Esq.
BRUCE D. COLLINS, ESQ.
Vice President and General Counsel
National Cable Satellite Corporation
Suite 650
400 North Capitol Street, N.W.
Washington, D.C. 20001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF NICKOLAS DAVATZES

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Nickolas Davatzes, being duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of Hearst/ABC/NBC, a joint venture operating as a partnership under the name of Arts & Entertainment Network ("A&E"), a position I have held since 1983. I submit this Affidavit in support of plaintiff's Motion for a Preliminary Injunction.

2. A&E is a joint venture operating as a partnership, composed of (1) The Hearst Corporation, a Delaware Enterprises, Inc., a Delaware corporation, located and doing business at 77 West 66th Street, New York, New York 10023, (3) RCA Cable Inc., a Delaware corporation, located and doing business at 30 Rockefeller Plaza, New York, New York 10112, and (4) Radio City Music Hall Productions, Inc., a Delaware corporation, located and doing business at 1230 Avenue of the Americas, New York, New York 10020. A&E is duly organized under the laws of the State of New York and is located and doing business at 235 East 45th Street, New York, New York 10017.

3. A&E is a 24-hour per day television entertainment program service launched on February 1, 1984. A&E is

distributed principally to subscribing cable television systems in the United States and Canada. A&E's programming is acquired from, produced by or coproduced with a variety of American and international sources, and consists of entertainment programming in four areas—comedy, drama, documentaries and performing arts.

4. Since 1985, when the FCC's must carry rules were first struck down in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and A&E reached only around 14,000,000 subscribers, A&E's subscribers have increased by approximately 400% to 55,600,000 as measured by A.C. Nielsen Company. The growth of A&E's subscriber base and the diversity and economic viability of new cable networks such as A&E, Black Entertainment Television, Nickelodeon, Lifetime and The Discovery Channel, among others, are due in large part to the absence until now of must carry rules and other legislative and regulatory restrictions upon cable operators' editorial discretion.

5. During those same years and for the same reasons, A&E's investment in programming increased by over 450%. A&E's ability to increase its programming expenditures has made possible the excellence of the programming for which A&E is recognized. However, the network's ability to continue, let alone increase its investment in programming hinges directly on its continued carriage by cable operators in channel positions which television viewers have come to expect through viewing for a period of years. The current cable legislation operates to favor broadcasters to the detriment of cable programming networks by granting broadcast stations preferential treatment with respect to cable carriage, channel positioning, and guaranteed access to viewers.

6. Cable operators, to comply with the new statutory requirements with respect to preferential carriage and channel position designed solely to benefit broadcasters, may be forced to (i) drop A&E entirely from cable sys-

tems, (ii) move A&E from its current, well-established channel position, or (iii) move A&E from a basic to a higher, less-viewed tier. Not only do the statutory requirements overtly favor broadcaster speech, they also compel a cable operator to disfavor cable program networks.

7. Cable systems do not have unlimited channel capacity and most cable systems operate at full or nearly full available capacity, carrying a mix of broadcast and non-broadcast services based upon viewer demand and other marketplace considerations. Under the statute, broadcasters can demand cable carriage without regard to viewer preference or program diversity. This leaves fewer cable channels available for the carriage of cable program services. Accordingly, the statute requires cable systems operating at full capacity to delete cable program services to accommodate the must carry demands of broadcasters. As a basic cable network, A&E receives revenue not only from advertising sales, the rates for which are based on the number of A&E viewers, but also from monthly license fee payments from cable operators, based upon the number of A&E subscribers. The number of A&E viewers and subscribers will necessarily decline, as will A&E's revenues, if cable operators are forced to drop A&E from their systems.

8. Under the statute, broadcasters electing must carry are also given the right to choose among a number of channel position options. Thus, even where cable programmers are not dropped to accommodate must carry broadcast stations, they may be displaced to inferior channel position and suffer loss of audience. By requiring that broadcasters decide where they are to be carried on cable systems, the channel positioning requirements of the 1992 Cable Act not only interfere with the cable operators' editorial discretion but also with the relationships established between cable operators, cable program networks and viewers. In general, lower channels are more watched than higher channels and channels located close

to other popular channels have higher viewership or greater sampling by viewers, thus having competitive consequences within the television industry as a whole. In many cable systems A&E occupies a desirable channel position, in which A&E has invested significant time and resources to obtain and maintain, and with which A&E has become strongly identified among its viewers over many years. However, under the must carry provisions of the Act, A&E can be displaced without regard to viewer preference, at the whim of a broadcaster who can appropriate the channel position that it had occupied over seven years ago in July 1985. There can be no justification for granting artificial advantages such as these to broadcasters, at the expense of the cable networks, particularly since viewer demands and other marketplace factors are not taken into consideration for the must carry process.

9. The statute requires cable operators to place all broadcast stations carried pursuant to must carry or retransmission consent on the initial or basic tier of service available to all cable system subscribers. The statute requires this initial level of service to be made available on all television sets connected to cable service and also requires all cable customers to purchase all broadcast stations carried pursuant to must carry and retransmission consent in order to obtain any other services carried on a cable system. Cable services presently carried on the basic tier may be displaced to higher tiers in order to accommodate additional broadcast stations on the basic tier. Specialized networks such as A&E have higher penetration levels when offered on a basic tier, since some cable subscribers do not choose or cannot afford to pay extra monthly fees to receive a higher tier that includes A&E. A drop in the number of A&E subscribers will cause a decline in advertising revenue as well, since a network relies on the widest possible penetration to support its rating base. Curtailed revenues in turn will dimin-

ish the funds A&E can utilize to develop new programming, to the obvious detriment of the network and the viewing public.

10. The must carry, channel position and retransmission consent provisions of the 1992 Cable Act clearly favor broadcaster speech and disfavor cable programmer speech, and drastically impair the ability of cable operators to respond to viewer preferences through the exercise of their editorial discretion. As such, the 1992 Cable Act infringes on the First Amendment rights of cable networks such as A&E, cable system operators and the American public.

/s/ Nicholas Davatzes
NICKOLAS DAVATZES

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DOUGLAS V. HOLLOWAY

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Douglas V. Holloway, being first duly sworn, deposes and says:

1. I am Senior Vice President—Affiliate Relations of plaintiff USA Networks ("USA"). I first joined USA in 1983 as Director of National Accounts. In 1986, I was promoted to Vice President of National Accounts and in 1988, I was promoted to my current position. I submit this Affidavit in support of Plaintiff's Motion for a Preliminary Injunction.

2. USA is a New York Partnership, owned in equal shares by MCA Cable Services, Inc., a Delaware Corporation and Eighth Century Corp., a Delaware Corporation. USA operates two satellite-delivered program services—USA Network and The Sci-Fi Channel.

3. USA owns and operates USA Network, a 24-hour per day satellite-delivered general entertainment program service. USA Network's programming is distributed primarily by cable system operators throughout all 50 states, Puerto Rico, and the United States Virgin Islands and Guam. USA Network's programming includes original movies, original television series, previously-viewed theatrical movies and television series, cartoons, game shows

and other material. USA Network commenced operations on October 5, 1981. According to information provided by A. C. Nielsen & Co., as of September 1, 1992, USA Network, was available in 60,224,000 households.

4. USA owns and operates The Sci-Fi Channel, a 24-hour per day satellite-delivered program service. The Sci-Fi Channel's programming is distributed primarily by cable system operators. The Sci-Fi Channel's programming consists of original series, previously-viewed theatrical movies and television series and cartoons in the science fiction genre, including fantasy and horror. The Sci-Fi Channel commenced operations on September 24, 1992.

5. USA Network, as one of the first satellite-delivered program services had limited distribution during its early years. As more cable systems were built, USA Network's programming was distributed to an increasing number of homes. USA Network, like many other networks, was able to invest in more original programming and better-quality theatrical movies and off-network television series. The improvement in programming made cable a more attractive consumer product and cable system operators were able to increase their number of subscribers. This symbiotic growth allowed cable system operators upgrade to their systems and expand their channel capacity. It also allowed existing networks to invest in more and better programming and encouraged the development of new and diverse program networks.

6. There has been a tremendous increase in the diversity of programming available to the American public. Cable subscribers now are free to choose among a panoply of diverse offerings including sports, news, music videos, cartoons, game shows, first-run movies, classic movies, etc. —all without turning to the over-the-air stations that were its only choice just 15 years earlier.

7. In 1985 and again in 1987, must carry regulations were struck down as unconstitutional. The absence of must carry rules during the last seven years have been a significant factor in the growth of cable program networks. Cable operators have been free to select the programming that their subscribers want. This leveling of the playing field encouraged the development of more networks like The Comedy Channel, Ha!, "E", CNBC, TNT, The Cartoon Network and The Sci-Fi Channel. It also helped to induce existing networks to improve their programming, including a dramatic increase original production, creating more jobs in related industries. In 1985, USA Network's total programming expenditure, including production, was $29.0 million. In 1992, USA Network's figure is projected to be approximately $193.0 million.

8. The vast majority of cable systems made substantial investments in plant and equipment to increase the number of channels which they provided to their subscribers. Nevertheless, as more networks have launched, and existing networks have expanded their offerings, channel availability has become tight. There has been intense competition among many networks for very limited channel availability.

9. USA launched The Sci-Fi Channel on September 24, 1992 with an impressive array of classic science fiction television series and movies, as well as original programming and high-tech interstitial material. Many cable systems informed USA that they wanted to include The Sci-Fi Channel on their systems, but were unable to do so because they had no available channels. Listed below are just a few specific examples:

(a) Comcast—Flint, MI
54 channels with one open channel on hold due to re-regulation must-carry concerns

(b) Post Newsweek—Fargo, ND
41 channels with no open channels.

(c) Multimedia—Wichita, KS
36 channels with no open channels.

(d) Storer—Louisville, KY
42 channels with no open channels.

(e) Times-Mirror—Lafayette, IN
54 channels with three open channels on hold due to re-regulation must-carry concerns.

(f) Cox—Parma, OH
30 channels with no open channels.

(g) Continental Cablevision—Pompano Beach, FL
54 channels with no open channels.

(h) Sammons Cable TV—Dover, NJ
37 channels with no open channels.

(i) TKR Cable—Parlin, NJ
41 channels with no open channels.

(j) Comcast—Indianapolis, In
39 channels with no open channels.

(k) Viacom Cable, Tacoma, WA
34 channels with no open channels.

(l) Cox Cable—Santa Barbara, CA
36 channels with no open channels.

(m) KBLCOM—Paragon Cable of Garden Grove, CA
54 channels with no open channels.

(n) Prime Cable—Las Vegas, NV
52 channels with no open channels.

10. While many cable system operators may prefer The Sci-Fi Channel to an existing broadcast station, the must carry statute prohibits them from exercising their first-amendment rights as speakers.

11. The new statute also mandates that broadcast stations receive preferential treatment in the specific channels to which they occupy on cable systems. USA has emphasized channel positions in its negotiations with cable operators for at least the last seven years. USA has made a number of studies of the effect of channel positioning on viewership. Each such study has reached the same conclusion: the lower the channel position, the greater the viewership. Under the new law, USA Networks is likely to be taken off its present channel in a number of cable systems. The result is damaging to USA Networks and to the viewing public which expects to find certain programming on certain channels. The only beneficiary is the broadcast station. We can find no justification for so favoring such a speaker.

Conclusion

12. The must carry statute divides speakers into two groups—the favored broadcast stations and the unfavored cable networks. The fact is that both groups compete for distribution and viewership. We can find no rationale for government to dramatically tip the balance in this highly competitive environment that has produced so much benefit to the American public. Diversity and choice are positive goals of our national communications policy, which should be fostered.

The 4th day of November, 1992.

/s/ Douglas V. Holloway
DOUGLAS V. HOLLOWAY

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF LEE MASTERS
PRESIDENT AND CEO, E! ENTERTAINMENT TELEVISION, INC.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Lee Masters, being first duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of E! Entertainment Television, Inc., a position I have held since January, 1990. Prior to that time I served as the Executive Vice President and General Manager of MTV, Music Television, a basic cable television network owned by MTV Networks, Inc. My tenure at MTV Networks included responsibility for the operation of MTV and VH-1, another basic cable television network. Since April, 1986, I have been a senior executive in the cable television programming business.

2. E! Entertainment Television ("E!") is a 24-hour, advertiser-supported basic cable network originating in Los Angeles and presenting news, programs and features about the world of entertainment to nearly twenty million cable television households. A relative newcomer to the ranks of cable networks, E! continues to experience the most difficult obstacle faced by creators of new programming: the lack of available channels on local cable systems.

3. Formerly named "Movietime," the network was launched to two million homes in July, 1987. In June, 1990, the network's format was completely changed and the channel was re-launched as E! Entertainment Television. Initially, the channel offered rotating short segments of entertaiment news and information. However, in January of this year, E! changed its programming format to long form (hour and half hour) programs. This commitment to a new format required substantial additional investment in the network. From its new state-of-the-art production facility in Los Angeles' mid-Wilshire district, E!'s staff of 396 employees currently produces almost all of E!'s programming.

4. E! represents a completely unique programming service, providing its cable audience—particularly female viewers—continuous coverage of the entertainment industry, and information on entertainment choices, not available elsewhere on the television spectrum. However, in order to continue offering and up-grading its programming, E! must have access to channel space on cable systems.

5. At no time during my more than six years involvement as a senior executive in cable television programming has the unavailability of channel capacity on local cable television systems been as widespread as it is today. We have heard from numerous cable system operators that while they would like to have E! on their systems, and that their viewers would value E!'s service, they currently have no available channel capacity.

6. Furthermore, for many cable television operators, the provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") have created a nearly complete barrier to new launches of E!. Cable operators, required under the Act to allocate channels to over-the-air television stations, have informed E! that they will not launch our service because they will need channel capacity to satisfy the must carry and other

obligations under the Act. Examples of cable operators so informing E! as follows:

Falcon Cable TV, Los Angeles, California. This multiple system operator has informed E! that many of their cable television systems have placed all futures launches of basic cable networks, including E!, on indefinite hold due to the uncertainties created by the Act.

MultiVision Cable TV Corp., Prince Georges County, Maryland (73,000 subscribers). This systsm is not currently carrying E!, is not carrying all must carry signals and will therefore not launch E! on an indefinite basis.

Adelphia Communications Corp., Coudersport, Pennsylvania. No new launches of E! by this multiple system operator will be undertaken in any system until the financial impact of the must carry retransmission provisions of the Act have been determined.

TKR Cable Company, Warren, New Jersey. New launches of satellite delivered channels such as E! have been indefinitely suspended in light of the possibility that channel capacity will be needed to satisfy must carry obligations.

7. Based on our experience since the passage of the Act, there can be no doubt that numerous cable operators previously considering launching E! will not do so as long as they must reserve channel capacity for must carry stations.

/s/ Lee Masters
LEE MASTERS

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF TERENCE F. McGUIRK

STATE OF GEORGIA)
) ss:
COUNTY OF FULTON)

Terence F. McGuirk, being first duly sworn, deposes and says:

1. I am Executive Vice President of plaintiff Turner Broadcasting System, Inc. ("TBS"), President of its Turner Sports Division, and a Director of the Company since 1987. I first joined the Company in 1972. In 1975, I became Director of Cable Relations. I became Director of Special Projects in 1978. I was promoted to Vice President of the Company in 1979. I submit this Affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

Factual Background

2. TBS, a Georgia corporation organized in 1965, is a diversified company whose business segments include entertainment, news, syndication and licensing, sports, and real estate operations. Among its business segments relevant to the instant action are its five cable program networks.

3. The Cable News Network ("CNN") is a 24-hour per day news cable program network that utilizes a format consisting of up-to-the minute national and international news, sports news, financial news, science news, medical

news, weather, interviews, analysis and commentary. CNN maintains 27 news bureaus worldwide, nine in the United States and 18 located throughout the world. CNN has become world-wide news network of record and an indispensable source for news and information, from Desert Storm to full coverage of the political process. As of September 1991, CNN was available in the United States on 11,392 cable systems reaching 53,098,655 subscribers.

4. Headline News, a second 24-hour per day news cable program network, was inaugurated in December 1981. Headline News uses a concise, fast-paced format which provides a consistent, updated half-hour newscast. As of September 1992, Headline News was available in 5,638 cable systems reaching 45,129,865 subscribers. Headline News allows its cable affiliates to insert a 5-minute local newscast at the end of each half-hour; over 7 million cable households currently receive Headline News in that format.

5. TBS owns and operates TBS Superstation, a 24-hour per day independent UHF television station licensed by defendant Federal Communications Commission ("FCC") to Atlanta, Georgia. TBS Superstation is telecast over the air to the Atlanta market and is also retransmitted by a common carrier via satellite to cable systems all over the United States, Puerto Rico and the Virgin Islands. Consistent with the copyright laws, TBS Superstation relies principally on advertising revenues and receives no direct compensation for its signals to cable systems, or from the common carrier which delivers the TBS signal to the cable systems. TBS Superstation provides programming 24 hours a day. The Company acquires original programming from film companies, previously viewed programming from syndicators and sports programming. As of September 1, 1992, TBS was available in 11,351 cable systems and distribution outlets and had 51,384,100 subscribers.

6. TBS's second entertainment cable program network, TNT, began operations on October 3, 1988 and is distributed principally to subscribing cable television systems. TNT's programming is derived from the film library owned by TBS's subsidiary, Turner Entertainment Company, original programming, sports events, and syndicated programming. As of September 1, 1992, TNT was available through 8,624 cable systems and had 51,324,881 subscribers.

7. TBS's newest cable program network, The Cartoon Network, launched on October 1, 1992. The Cartoon Network is a 24-hour per day programming service, and consists of entirely animated programming distributed to cable television systems. At its launch, it was available in 233 cable systems, representing 1,923,254 subscribers.

8. Cable operators receive or originate signals from different sources, then amplify and retransmit those signals over coaxial and fiber optic cables to subscribers. Cable operators choose what programming to present to their subscribers from sources including local broadcast station signals, signals of distant broadcast television stations such as TBS Superstation, locally-originated cable programming, and cable network programming such as CNN.

9. Broadcast television stations possess multiple means of transmitting their signals to their audiences. Pursuant to the Communications Act, broadcast television stations are licensed by the FCC for free to utilize specified portions of the radio-magnetic spectrum to transmit their signals over-the-air to antennas connected to television sets. Broadcast stations are also able to transmit their programming over-the-air to cable systems for subsequent retransmission to cable system subscribers. Absent carriage on a cable system, a broadcast television station can transmit its signal over-the-air to virtually every home within its licensed community.

10. Cable program networks receive no access to the government-controlled radio-magnetic spectrum and can only reach their viewing audience by obtaining access to a channel on a cable system or similar distribution system. Cable networks therefore reach only the approximately 60 percent of television homes that subscribe to cable. Cable systems operate under franchises granted by local governments and pay those governments up to five percent of revenues as franchise fees.

11. The Turner cable program networks are part of a tremendous diversity in program offerings that such networks have provided to the American public during the last 15 years. This diversity was made possible by entrepreneurial instincts of the networks' founders, the growth of the cable industry and the development of a satellite-based distribution system. Today, cable program networks include approximately 80 national and regional programming services that provide general entertainment and sports programming in addition to discrete services that specialize in such areas as news (CNN), financial and other informational services (CNBC. Discovery Channel), coverage of Congressional deliberations (C-Span) and children's (Nickelodeon), music (Nashville Network, MTV), sports (ESPN), religious and minority-oriented (Black Entertainment Television) programming. This rich diversity in program offerings could not be achieved in mass audience oriented and scarcely allocated over-the-air broadcast stations.

12. To be sure, since the development of cable program networks, the viewership in cable homes of broadcast stations have declined from the levels that existed where broadcast stations represented the only choices available. The changes in viewing patterns represents the exercise of the viewing public's right to choose freely among diverse program offerings what the viewer wants to watch. (The decline in broadcast station audiences is also partially attributable to other alternatives now available to television viewers, for example, prerecorded tapes and video games.)

History of the Must Carry Rules

13. Until, as discussed below, struck down by the courts as unconstitutional, must carry regulations adopted by the FCC were major impediments to the development of the diversity provided by cable program networks and made it difficult, if not impossible, for cable program networks to reach their intended audiences.

14. The must carry rules were originally adopted by the FCC in 1965 and were applied to all cable systems in 1966. There were no cable program networks in existence when the must carry rules were enacted.

15. TBS's objections to must carry regulations are of longstanding. Faced with the regulatory impediment to its ability to speak over cable through its programming services represented by the must carry rules, TBS filed a petition with the FCC to delete the must carry rules in 1980, the same year it introduced it first cable program network, CNN. The FCC took no action on TBS's position.

16. In October 1983, TBS asked the United States Court of Appeals for the District of Columbia to compel FCC action unreasonably delayed. Thereafter, the Commission agreed to act; the FCC reaffirmed its must carry regulations in April 1984. In July 1985, the United States Court of Appeals struck down the must carry rules as violations of First Amendment rights of cable programmers and cable operators. The FCC adopted a second, more limited set of must carry regulations in 1986. They too were struck down as unconstitutional in 1987.

17. The absence of must carry rules during the last seven years has contributed significantly to the further development and diversity represented by the cable program networks, including TBS' networks, in two very

important respects. *First*, it has permitted cable operators to exercise their editorial discretion in choosing program offerings that their subscribers want and has led to the introduction of new programming networks and expansion of already existing cable program networks.

18. *Second*, this expansion and growth has permitted cable program networks to increase substantially their ability to create and offer original programming, whether entertainment, informational, or news. This expansion has certainly been the case with respect to TBS' services. CNN's ability to provide worldwide, indepth news coverage has been funded by its growth in the past seven years. In 1984, CNN's and Headline News' news programming budget was $65 million. In 1993, it will be $181 million.

19. TBS has been able to initiate two new entertainment program services, TNT and The Cartoon Network, in the last seven years. Furthermore, TBS has been able to increase markedly the original programming it offers on its services. In 1984, it invested $45 million in all entertainment programming. In 1993, that number will be $433.6 million, including $82.6 million in original programming.

The New Must Carry Requirements Affect TBS's Ability to Reach Audiences and Thus to Speak

20. The new must carry statute institutes requirements far more onerous on cable operators and therefore far more harmful to cable program networks than those found unconstitutional in 1987. The must carry statute requires cable systems to allocate up to one-third of their channel capacity for the mandatory carriage of television station signals; the 1986 FCC regulations invalidated as unconstitutional required only a maximum of one-fourth of a cable system's capacity be reserved for must carry stations. The geographic area in which broadcast stations can claim mandatory carriage status is broader in the must carry statute than in either version of the FCC's must carry regulations.

21. The must carry regulations invalidated in 1987 attempted to incorporate viewer preferences by requiring a minimum viewership standard to be met by broadcast stations to qualify for mandatory carriage. The must carry statute contains none—viewer preference is made absolutely irrelevant.

22. The must carry statute adds a category of broadcast station to those eligible for carriage—low power television stations. Low power stations were not eligible under either set of FCC must carry regulations.

23. The must carry statute goes farther than the FCC regulations set aside in 1987 in providing carriage rights for non-commercial stations. Moreover, the must carry statute retroactively freezes into law the exercise of editorial discretion by cable operators. Any non-commercial educational television station carried by a cable system as of March 29, 1990 must continue to be carried.

24. The growth of cable program networks, to some extent, has now caught up with the channel capacity of many cable operators. Thus, compared with 1988, when TNT was launched with 17 million subscribers, The Cartoon Network began operations last month with only 2 million subscribers, less than 3% of the cable viewing universe.

25. Many cable systems have informed TBS that they were interested in including The Cartoon Network in their offerings and thought that The Cartoon Network contained programs that their viewers would be interested in receiving. However, each of these cable networks had no available capacity. Some specific examples of cable systems who have so informed TBS include:

(a) Storer Cable Communications—Louisville, KY
43 channels with no open channels.

(b) Storer Cable—Bowling Green, KY
35 channels with no open channels.

(c) Viacom Cablevision—Nashville, TN
36 channels with no open channels.

(d) Cox Cable Middle Georgia—Macon, GA
52 channels with no open channels.

(e) Cablevision—Memphis, TN
36 channels with no open channels.

(f) Ventura County Cablevision—Westlake Village, CA
39 channels with no open channels.

26. Even if we were to convince any of these cable operators or its audiences that The Cartoon Network is a preferred alternative to an existing broadcast station, the must carry statute would permit these broadcast stations to ensure continued carriage on these cable systems.

27. The reduction of available outlets through which cable program networks can speak will be made even worse by the must carry statute. Broadcast stations not currently carried by systems can invoke must carry to displace cable program networks that are currently being offered by these cable operators. Specific examples where we have been unable to obtain an outlet for The Cartoon Network, or other TBS services are currently being carried, where the must carry statute would appear to provide additional broadcast station carriage rights that would displace existing speakers include:

(a) Georgia Cable TV and Communications—Atlanta, GA
52 channels with no open channels.

There is a UHF station in nearby Rome, Georgia which is not carried by the system and is requesting carriage. Since the system currently carries nine broadcast stations, and the must carry limit is 17, a cable program network would have to be dropped.

(b) TCI Cablevision—Contra Costa County, CA
42 channels with no open channels and at least five broadcasters requesting carriage. Five cable program networks would have to be dropped.

(c) TCI Cablevision—Eugene, OR
36 channels with no open channels and one broadcaster requesting carriage. A cable program network would have to be dropped.

(d) Columbia Cable—Columbia, OR
63 channels with no open channels and one broadcaster requesting carriage. A cable program network would have to be dropped.

28. The potential displacement of existing cable program networks and foreclosure of potential opportunities for new cable networks to speak caused by the new must carry statute is strikingly illustrated by the Viacom systems in Northern California. For example,

(a) The 55-channel Viacom system in San Francisco already carries 11 commercial broadcast stations and 3 noncommercial broadcast stations. Although the system currently has 2 blank channels, the must carry statute would require Viacom to add 4 more commercial broadcasters and 2 more noncommercial broadcasters, co-opting the 2 open channels and requiring the displacement of 4 present speakers.

(b) The 38-channel Viacom system in Marin already carries 14 broadcast stations (10 commercial, 4 noncommercial), equal to the number of basic cable networks being carried. Yet the must carry statute would require up to 3 additional commercial and 1 additional noncommercial station to be carried, displacing 4 cable networks currently reaching audiences in Marin.

(c) A similar situation exists in the 38-channel Viacom system in East Bay. It has no open channels. It already carries 12 broadcast stations (9 commercial, 3 noncommercial). While it has no room for new cable networks, the must carry statute will require East Bay to add up to 6 additional broadcast stations (4 commercial, 2 noncommercial), and potentially therefore require the system to drop over half of the 13 basic cable networks East Bay current carries.

(d) The 37-channel Viacom system in Pinole carries 13 broadcasters (9 commercial, 4 noncommercial). Pinole currently has 1 open channel. Instead of Pinole exercising its editorial discretion as to how to program its open channel, instead of the Pinole subscribers having any role in deciding what speaker they wish to hear, instead of cable program networks like TBS having an opportunity to convince Pinole to let it speak, the must carry statute, by government fiat, grabs that open channel for a broadcaster. Not only that, the must carry statute will require Pinole to add up to 4 additional commercial broadcasters and thus also to displace 3 cable program networks that currently speak to Pinole.

(e) A similar situation exists in the 37-channel Viacom system in Petaluma, where there is currently one open channel. Although 14 broadcasters are currently being carried (10 commercial, 4 noncommercial), the must carry statute will require Petaluma to carry up to 3 more commercial broadcasters, both preempting the open channel and silencing 2 current speakers on the Petaluma system.

29. The situation is not confined to northern California. For example, Viacom is also facing the necessity of displacing cable networks in other areas of the country:

(a) In Viacom's three Puget Sound, Washington systems, Viacom currently has no open channels. Although the 34-channel Puget Sound South system currently carries 9 broadcast stations (7 commercial and 2 noncommercial), it will have to add 2 commercial stations and an additional noncommercial station, displacing 3 current cable network speakers. In Puget Sound Central, 8 broadcasters are currently carried, but 2 additional commercial and 1 additional noncommercial station will have to be added to the 37-channel system, again displacing 3 cable networks. Two additional commercial stations would be added to the 7 already carried on the 37-channel Puget Sound North system, again displacing two cable networks.

(b) In Dayton, Ohio, Viacom operates a 38-channel system with no open channels. It would have to add 1 additional commercial station, and may have to add 3 Cincinnati noncommercial stations, all within 50 miles of Dayton, which would bump up to 4 cable networks.

(c) The 37-channel Viacom system in Salem, Oregon again has no open channel, but would have to add 2 additional commercial broadcasters to the 6 it now carries, and 1 additional noncommercial station to the 1 it now carries, displacing 3 current cable speakers in Salem.

(d) In Nashville, Tennessee, the 38-channel Viacom system has 1 open channel. But like the Pinole and Petaluma systems, that channel would be grabbed by government fiat for an additional broadcast station. Nashville currently carries 5

commercial broadcast stations and 1 noncommercial station. It would have to add 3 additional commercial stations and may have to add 2 additional noncommercial stations licensed to Bowling Green, Kentucky. Hence, 4 cable speakers could be displaced.

The Channel Positioning Requirements Harm Cable Program Networks

30. With the absence of government regulation, cable operators have exercised their editorial discretion in creating various packages of program services to offer their subscribers and in arranging and grouping program offerings among its channels. As a newspaper editor or bookstore owner decides the best way to display or arrange stories or books, cable operators have utilized their judgment to do the same.

31. Channel positions are important to broadcast and cable networks. For example, for new networks, being placed near well-established or popular channels will lead to sampling by viewers or exposure to programming that can lead to success, and growth. Certain technological characteristics of some television receivers make certain channel positions more desirable.

32. The must carry statute interferes with cable operators' editorial discretion and the opportunity for cable program networks to convince operators to provide them certain outlets by governmentally providing certain unilateral rights to broadcasters to decide where they are to be carried on cable systems.

33. The inescapable conclusion is that these provisions give broadcasters the unilateral rights to cream-skim choice positions from which to speak to the viewing audience. Particularly pernicious is the option given each broadcaster to obtain the carriage position it had on July

19, 1985, when the FCC's original must carry regulations were declared unconstitutional. Many cable program networks, like TNT and The Cartoon Network, did not exist in 1985. Other cable program networks were only able to obtain access to cable systems once the must carry regulations that mandated the carriage of every broadcast station, even duplicative signals, were found unconstitutional. Furthermore, since 1985, hundreds of cable systems have expanded their capacity. For example, a 36-channel cable system would not have been able to carry Channel 45 or Channel 50 on its Channel 45 or 50 because it did not exist. It now may be doing so, yet those broadcasters are given the unilateral right to push a cable network off a lower number and be returned to their 1985 position. There is no justification for this government fiat.

34. For example, CNN is currently carried in the Howard County, Maryland cable system on Channel 12. In 1985, however, WDCA was carried on Channel 12. WDCA, Channel 20 in Washington, is carried on Channel 20 on the system. Under the channel positioning provisions of the Act, WDCA has the governmental-granted right to reclaim Channel 12 if it desires to displace CNN. There is no governmental interest that can justify the encroachment on the cable operator's editorial discretion or justify the elevation of WDCA's speech rights over CNN.

33. Similarly, in the Mt. Carmel, Pennsylvania cable system, within the Philadelphia ADI, TNT is carried on Channel 7, while WPHL-TV, licensed to Channel 17, is carried on Channel 17 by the cable system. Yet in 1985, before TNT even existed, WPHL was on Cable Channel 7. Under the must carry statute, WPHL is given by the government the right to oust TNT.

Conclusion

34. The must carry statute divides speakers into two groups. The first group, broadcast stations, who have been given free by the government an over-the-air route into the home, are given a government preference that guarantees them a second duplicative route into homes via cable, no matter whether the subscribing public wants to receive the broadcast stations. The statute then creates a second, inferior group—cable program networks—who must vie for the carriage slots left over, even though these cable systems represent their only practical means of reaching their intended audience. Cable program networks, like the TBS networks, have been competing with over-the-air broadcasters, and we will continue to do so. There is no justification, in my view, for the governmental thumb to be placed on the broadcasters' side of the scale. The inevitable effect of the must carry statute will be to limit cable program networks' available resources to put into original programming and to develop new programming services, leading to a net reduction in diversity available to the public and a net reduction in speech.

This 1 day of November, 1992.

/s/ Terence F. McGuirk
TERENCE F. MCGUIRK

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF TIMOTHY B. ROBERTSON

Timothy B. Robertson, being first duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of plaintiff International Family Entertainment, Inc. ("IFE"). I submit this Affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

2. IFE is a Delaware corporation whose principal place of business is 1000 Centerville Turnpike, Virginia Beach, Virginia 23483. IFE owns and operates The Family Channel, a 24-hour per day cable television network that is primarily distributed through cable television systems; throughout the United States. The Family Channel was originally launched in April 1977 as CBN Satellite Network. The Family Channel provides family-oriented entertainment, including original made-for-television movies, dramatic and comedy series, classic westerns, specials, inspirational programs, and children's programming.

3. IFE has also publicly announced plans to launch a new cable program network, The Game Channel. The Game Channel is contemplated to be a 24-hour per day cable program network distributed primarily through cable television systems. As proposed, The Game Channel programming will consist of previously produced game shows that include an interactive element allowing viewers to participate.

4. Since the original must carry rules were struck down in *Quincy Cable TV, Inc. v. FCC*, 768 F.2D 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), The Family Channel's total audience has increased dramatically. As of July, 1985, when the original must carry rules were invalidated, The Family Channel (then known as CBN Cable Network) was distributed to approximately 5,700 cable systems and received by approximately 29 million subscribers. Today, The Family Channel is distributed to more than 10,000 cable systems and received by more than 55.7 million cable television subscribers. Moreover, according to A. C. Nielsen figures, ratings for The Family Channel's 7:00 p.m. to 10:00 p.m., Monday to Friday time period increased 14 percent, from 0.7 to 0.8, during the period September 1991 to September 1992. As these figures demonstrate, the American public has expressed a preference for the type of family-oriented programming offered by The Family Channel.

5. Cable systems channel capacity has become increasingly scarce since the must carry requirements were invalidated in *Century Communications Corp. v. FCC*, 835 F.2D 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). With the development of new programming services, competition for channel system capacity has become particularly fierce. The enactment of the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 has made it even more difficult for cable systems to continue carrying The Family Channel because cable systems are now required to carry a significant number of commercial television stations, noncommercial educational television stations, and low power television stations.

6. Channel positioning is extremely important to the success of The Family Channel. For that reason, IFE offers a 15 percent rebate of license fees to cable systems that carry The Family Channel on channels 2 through 20. Despite the rebate, cable systems are already shifting The Family Channel from its established positions on channels

2 through 20 to new channel positions above channel 20. Comparing cable systems that carried The Family Channel during the third quarter of 1992 and during the first quarter of 1992, approximately 155,000 fewer cable subscribers now receive The Family Channel on channels 2-20.

7. Due to the increasing scarcity of cable system channel capacity, it has been difficult for IFE to obtain carriage for The Game Channel. The success or failure of The Game Channel depends of IFE's ability to obtain carriage for the program service on cable systems. The enactment of the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, has made it even more difficult for IFE to obtain carriage for The Game Channel because cable systems are now required to carry a significant number of broadcast television stations. In fact, a number of cable systems, including several of the largest multiple system operators, have informed IFE that they are unlikely to carry a new service like The Game Channel for the foreseeable future due to limited channel capacity and the enactment of the new must carry requirements.

8. The must carry provisions, including the channel positioning requirement, and the retransmission consent provisions provide the broadcast industry with a substantial competitive advantage over cable networks, like The Family Channel. There is no legitimate justification for enhancing the economic interests of broadcast stations over cable networks, especially when the means involved completely disregard the viewing preferences of the public.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed this fifth day of November, 1992.

/s/ Timothy B. Robertson
TIMOTHY B. ROBERTSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

**AFFIDAVIT OF JOSEPH M. SEGEL
CHAIRMAN OF QVC NETWORK, INC.
IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

1. I, Joseph M. Segel, am the Chairman and Chief Executive Officer of Plaintiff QVC Network, Inc. ("QVC"). I am over 18 years of age and am competent to provide this affidavit.

2. QVC is a Delaware corporation. Its principal place of business is at 1365 Enterprise Drive, West Chester, Pennsylvania 19380.

3. QVC's principal business is a televised home-shopping service (the "QVC Service") that is dependent upon cable television systems for transmission to the American public in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands.

4. QVC was incorporated in June 1986 and commenced business in November 1986. The QVC Service can currently be received by approximately 43,000,000 homes through cable television systems.

5. QVC has agreements ("Carriage Agreements") with cable system operators to carry the QVC Service on more than 4,000 local cable systems as part of the basic cable television service. QVC makes no charge to either cable system operators or cable subscribers to receive the QVC Service. Each cable system operator receives five percent

(5%) of the net sales of merchandise sold to customers located in the cable system operator's service area.

6. As the principal consideration for cable system operators to enter into Carriage Agreements, over the past six years QVC has issued to cable system operators more than 60% of QVC's total equity for substantially less than the market value of that equity. Such consideration has been necessary because most cable systems do not have enough channels available to carry the more than 70 cable networks vying for carriage on cable systems as well as all local broadcast stations. The equity issued to cable system operators in consideration for carriage of the QVC Service has a present value in excess of $400,000,000. The number of shares of stock which each cable system operator was permitted to acquire was based on the number of subscribers, the channel position and the number of years during which the cable system operator committed in its Carirage Agreement to transmit QVC Service.

7. To the extent that any such cable system is not carrying all of the local VHF, UHF and low-power broadcast stations it would be required to carry under Section 4 of the Cable Television Consumer Protection Act of 1992 (the "Act"), the cable system would have to replace existing cable networks with broadcast stations.

8. Today there are two major competitors in the televised home-shopping business of approximately equal size: Home Shopping Network ("HSN") and QVC. Like QVC, HSN transmits its televised home-shopping presentations by means of cable systems. However, unlike QVC, HSN additionally retransmits its nationally-transmitted sales presentations on a 24-hour-a-day basis by means of more than 20 UHF broadcast stations. Unlike normal local broadcast stations, these UHF stations spend approximately 90% of their broadcast time retransmitting the nationally-transmitted HSN sales presentations rather than diversified or local television programming.

9. Under the provisions of Section 4 of the Act, cable system operators would be forced to carry HSN's virtually continuous sales presentations on the basic tier of many cable systems, even if operators have previously chosen not to carry HSN for economic and/or qualitative reasons. Additionally, those cable systems that already carry HSN's cable "feed" may also be forced to carry an HSN broadcast station with duplicative programming on another channel. In nearly all of those cases, it is likely that any competitive television home-shopping channel now being carried on the basic tier would either be squeezed off the cable system or be displaced to a higher channel.

10. To provide cable subscribers with maximum diversity of programs in a scarce channel environment, several cable system operators have allocated only one of their limited number of channels to televised home-shopping programming. If they are required under Section 4 of the Act to carry a broadcast station that is utilized predominantly to retransmit HSN sales presentations, then an established competitive cable network such as QVC would be in jeopardy of being expelled or excluded from the cable system.

11. Higher channels are less watched than lower channels and, therefore, are less valuable. QVC sales from carriage on channels 14 to 24 are only 92% of the average sales from channels 2 to 13. Channels 25 to 36 are only 84% as productive as channels 2 to 13; channels 37 and higher are only 62% as productive as channels 2 to 13. This situation will be exacerbated if broadcast stations are placed exclusively on the lower channels as part of basic cable television service and cable networks are displaced to higher channel positions.

12. If QVC is deleted from cable systems, many of the more than 4,000,000 cable television subscribers who have made purchases from QVC in the past two years will be deprived of access to their preferred shopping channel.

13. QVC will suffer substantial, immediate and irreparable injury if the provisions of Section 4 of the Act are enforced.

Pursuant to the provisions of 28 U.S.C. Section 1746, I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Joseph M. Segel
JOSEPH M. SEGEL

Executed: November 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF E. ROGER WILLIAMS

STATE OF GEORGIA)
) ss:
COUNTY OF COBB)

E. Roger Williams, being first duly sworn, deposes and says:

1. I am President and Chief Operating Officer of The Travel Channel, Inc. I have held this position since March 24, 1992. Prior to March 24, 1992, I was Senior Vice President, Affiliate Sales and Consumer Marketing for ESPN, Inc. I was employed by ESPN, Inc. since February 1, 1980. I submit this affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

2. The Travel Channel, Inc. is a Virginia corporation with its principal place of business in Atlanta, Georgia engaged in the business of providing a network television programming service to cable television systems.

3. The Travel Channel, Inc. is a 24 hour per day program service distributed principally to subscribing cable television systems. The Travel Channel, Inc.'s programming consists of programs dedicated to the subject of travel and programs featuring travel related subjects.

4. The Travel Channel began providing its service to cable systems on February 1, 1987. The Travel Channel was created by Trans World Airlines (TWA) as a promotional service and direct marketing vehicle for TWA. The

Travel Channel was purchased by Landmark Communications, Inc. on March 20, 1992. Landmark has since changed the focus of The Travel Channel from an airline promotion service to a service which provides viewers with programs consisting of travel entertainment, information, news and special events. The Travel Channel currently is seen in approximately 17 million cable households.

5. When The Travel Channel launched in 1987, the average number of channels per system was less than 32. (Today that number is 38.6). Despite this limited channel capacity environment, The Travel Channel was able to obtain carriage on 606 cable systems serving over 17 million subscribers. During this same period (1987-1992), 168 new television stations began operation. It is highly unlikely that The Travel Channel would have been able to enjoy the success it did in obtaining new systems if those same cable operators were forced to automatically grant carriage to these new (as well as other existing stations) broadcast stations. The absence of must carry allowed cable operators the ability to select the program offerings for their communities based on which service was of greater value to the community rather than artificially mandating carriage to broadcast stations (many of whom are duplicate network affiliates or independent stations carrying much of the same syndicated programming already being offered in the marketplace).

6. The new must carry rules will have a definite negative effect on the ability of The Travel Channel to increase the number of cable systems that carry our service. With channel capacity on cable systems being almost filled, cable operators will be unlikely to add any new cable services if they must first accommodate the necessary quota of existing and new broadcast stations. Further, there are now 192 outstanding construction permits for additional broadcast stations. Even if cable operators had capacity left after the imposition of must carry it is unlikely they would add new cable services while the threat remained that

these C.P.'s may become operational, gain must carry status, and thus force the operator to remove any recently launched cable services in order to accommodate the new broadcast station. This type of action would be extremely disruptive to the viewers.

7. The Travel Channel is also harmed by must carry within the existing system base. Approximately 50% of The Travel Channel subscriber base is part time. That is, we share a channel with other cable services. For a cable network to be successful, it must have full time carriage within each system. One of the immediate goals for The Travel Channel is to convert this part time system group to full time carriage. With the imposition of must carry, our ability to accomplish this goal will be negatively impacted.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on the fourth day of November, 1992.

/s/ E. Roger Williams
E. ROGER WILLIAMS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

STATEMENT OF MATERIAL FACTS OF INTERVENOR-DEFENDANT NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT IN TURNER AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT IN DANIELS

Defendant-Intervenor National Association of Broadcasters ("NAB") submits this Statement of Material Facts in support of its motion for summary judgment in No. 92-2247 and in support of its cross-motion for summary judgment in No. 92-2292.

1. For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multi-channel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers. Cable Consumer Protection and Competition Act of 1992 ("Act") § 2(a)(2); Affirmation of Jack N. Goodman ("Goodman Affirmation"), November 24, 1992, ¶¶ 9, 14-19.

2. There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a

result of this growth, the cable television industry has become a dominant nationwide video medium. Act § 2(a)(3); Goodman Affirmation, ¶¶ 9, 14-18.

3. The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers. Act § 2(a)(4); Goodman Affirmation, ¶¶ 8-11.

4. The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. Act § 2(a)(5); Goodman Affirmation, ¶ 20.

5. There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media. Act § 2(a)(6).

6. The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in Section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services. Act § 2(a)(9); Goodman Affirmation, ¶¶ 21-26.

7. A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation. Act § 2(a)(10).

8. Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate. Act § 2(a)(11).

9. Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming. Act § 2(a)(12); Affirmation of Mark R. Fratrik (Fratrik Affirmation), November 23, 1992, ¶ 6.

10. As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services. Act § 2(a)(13); Fratrik Affirmation, ¶¶ 2-6.

11. Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems. Act § 2(a)(14); Goodman Affirmation, § 20; Fratrik Affirmation ¶¶ 5-6.

12. A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried. Act § 2(a)(15); Goodman Affirmation, §§ 20-26.

13. As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized. Act § 2(a)(16); Goodman Affirmation, ¶¶ 20-26; Fratrik Affirmation ¶¶ 5-6.

14. Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to an antenna reception system, or cannot otherwise receive broadcast television services. The regulatory system created by the Cable Communications Policy Act of 1984 was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems. Act § 2(a)(17); Goodman Affirmation, ¶¶ 15-19.

15. Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest. Act § 2(a)(18); Goodman Affirmation, ¶¶ 15-19.

16. At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off-the-air

signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries. Act § 2(a)(19); Sherman Affirmation ¶ 8.

17. The Act's must carry requirements will have little effect on whether a particular cable program service is carried on a cable system. Whatever difficulties cable programmers have had gaining access is unrelated to must-carry rules, which have not been in existence since 1985. Affirmation of Charles E. Sherman ("Sherman Affirmation"), November 23, 1992, ¶¶ 4-5.

18. Overall popularity growth for cable programming is flat, and ratings for many prominent cable networks is declining. Sherman Affirmation, ¶ 7.

19. The least viewed broadcast station typically has a larger audience than the most-viewed cable network. Sherman Affirmation, ¶ 8.

20. Lack of capacity to accommodate additional cable programming is not a problem on many cable systems. Cable operators are increasingly engaging in the practice of "multiplexing," which means that a single cable network such as HBO is shown simultaneously (on different time schedules) on more than one cable channel. Cable capacity thus is presently used for purposes, such as multiplexing, that do not increase the diversity of programming. Sherman Affirmation ¶ 11.

21. Technical improvements, such as compression technology and fiber optic cable networks, are presently available, or will soon be available, and will substantially

increase the channel capacity of cable systems. Affirmation of Michael C. Rau, November 23, 1992.

22. There is no significant risk that viewers of programming provided by a cable system will believe that broadcast programming carried over that system pursuant to must carry requirements is conveying ideas, messages or points of view endorsed by the cable operator. Federal Communications Commission regulations require broadcasters to identify themselves when signing on and off each day, and at least once every hour during the day. 47 C.F.R. § 73.1201. Cable has a long history of serving as a conduit for broadcast channels, and consumers know that broadcast programming on a cable system is not the expression of the cable operator. Furthermore, cable operators have ample opportunity to use disclaimers should they feel any need to dissociate themselves from particular broadcast stations or messages. Goodman Affirmation, ¶ 27.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF DR. MARK R. FRATRIK

District of Columbia: ss

I, Dr. Mark R. Fratrik, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Vice President Economist of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. The National Association of Broadcasters and Price Waterhouse collect financial information on commercial television stations every year. A comprehensive questionnaire is mailed to every commercial television station, and nearly three-quarters of all of these stations respond. Given the high response rate, an accurate picture of the financial state of the television industry can be drawn. The annual *NAB Television Financial Reports* are considered to be the most complete information available about the economics of commercial television. I have been in charge of this project every year since 1985.

3. The most current report of these data, *1992 NAB Television Financial Report*, shows the perilous financial condition in which many television stations find themselves. Over one-quarter of all stations affiliated with the three major television networks (ABC, CBS and NBC)

lost more than $477,959 in 1991. One half of all independents, including those stations affiliated with the FOX network, lost more than $314,795 in 1991, with one quarter losing more than $1.6 million.

4. Interestingly, the average value for independents' pre-tax profits were positive. Taken together, these results indicate that there are a few independent stations who are doing quite well (considerably raising the average), while the vast majority of independent stations (shown by the median and quartile values) face very difficult financial times.

5. While some of this poor performance can be attributed to the poor overall U.S. economy, it is also consistent with recent trends of previous years' performances. For example, over one-quarter of all stations affiliated with the three major television networks lost more than $197,000 in 1990, prior to the economy entering into the recesson. In like fashion, one half of all independents lost more than $410,585 in 1990, with one quarter losing more than $1.6 million.

6. Even if many television stations are not headed for extinction as the Turner Plaintiffs suggest (Memorandum at 31), that is not the proper focus to determine the impact of anti-competitive behavior by cable systems. If stations' revenues are reduced, they will be forced to reduce expenses, and will be less able to acquire the most desirable programming or to devote as much effort and resources to local news and public affairs programming. Thus, the *quality* of service the public receives will be affected, even if stations are able to survive.

/s/ Mark R. Fratrik
MARK R. FRATRIK

[Notarization Ommitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF JACK N. GOODMAN

District of Columbia: ss

Jack N. Goodman submits this affirmation pursuant to 28 U.S.C. § 1746 in opposition to the motion for a preliminary injunction filed by the Turner plaintiffs in No. 92-2247, in opposition to the motion for summary judgment filed by Daniels Cablevision in No. 92-2292, and in support of NAB's cross-motions for summary judgment in both cases. This affirmation is based on personal knowledge.

1. I am Special Counsel in the Legal Department of the National Association of Broadcasters ("NAB"). I have practiced in the area of communications law since 1976, and have dealt with the issue of signal carriage obligations of cable television systems for at least ten years.

I. *Support for Must Carry By Cable Interests*

2. The current opposition to the must carry provision expressed by plaintiffs in these cases is in marked contrast with the *support* for must carry regulations expressed by cable industry leaders during hearings leading to the adoption of the Act.

3. On January 17, 1990, Mr. James P. Mooney, the President and Chief Executive Officer of the National Cable Television Association, wrote a letter to Senator Daniel K. Inouye, the Chairman of the Senate Subcommittee on Communications. Mr. Mooney stated: "NCTA

supports Congressional enactment of a must carry statute to assure continued carriage on cable systems of qualified local broadcast stations." Letter from Mr. James P. Mooney to the Hon. Daniel K. Inouye, January 17, 1992, *reprinted in, Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 548 (1990).

4. Dr. John Malone, the President and Chief Executive Officer of Tele-Communications, Inc., the Nation's largest cable operator, also stated: "Another source of recent complaints [about the cable industry] has been the 'must carry' issue, but TCI's position is clear. We have long supported an industry-wide compromise on this issue and fully endorse the standard proposed by Senator Inouye." *Id.* at 139. TCI, of course, is a major stockholder in Turner Broadcasting System, Inc. and other cable programming services which are plaintiffs in this litigation.

5. In later testimony, the cable industry's support for a "must carry" statute was reiterated. In testimony submitted in 1990, Mr. Mooney declared:

> "As we have stated before this Committee on several occasions, *NCTA supports Congressional enactment of a must carry statute to assure continued carriage of qualified local broadcast stations on cable systems.* And as a matter of public policy, NCTA agrees with on-channel carriage unless otherwise negotiated by the broadcaster and cable operator. Where it is not technologically possible to carry a broadcaster on his FCC assigned channel, or in cases of dispute, we support Chairman Inouye's proposal that the FCC develop rules for channel positioning. NCTA's main concern is that a must carry statute survive constitutional challenge in the courts, which previous FCC rules have not."

Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 101st Cong., 2d Sess. 62 (1990) (emphasis in original).

6. Amos Hostetter, the Chairman and Chief Executive Officer of Continental Cablevision, Inc., the Nation's third largest cable operator, and another principal stockholder in Turner Broadcasting System, also stated:

> "I think a better way of dealing with this problem is to go forward with a sort of must carry program that the chairman and Senator Danforth have each incorporated in their respective bills.
>
> "I mean, I think must carry is an important dimension of our national communication system. It reinforces the localism, which is the underpinning of that system and is an appropriate relationship with cable companies." *Id.* at 153.

7. During hearings in the 102nd Congress, Mr. Mooney again expressed the cable industry's support for must carry legislation. He said:

> "I would urge you to look at the second 'must-carry' case where the court of appeals said it is possible that within the bounds of the Constitution you might do something to protect broadcasting, but the something has got to be objectively premised, applied in a non-discriminatory manner as between broadcasters, and which is crafted so as to minimally intrude into the legitimate rights of cable operators and cable programmers to do their own kind of TV. *We were for that than [sic]. We are for it today.*"

Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 1034 (1992) (emphasis added).

II. *Economic Integration in the Cable Industry*

8. The cable industry is dominated by large multiple system owners, referred to as MSOs. These companies control thousands of individual cable systems and make the decisions as to which signals will be carried on those cable systems and available to subscribers of those systems. It is important to remember that, unlike television stations, cable systems rarely face any competition and, even in the few locations where there are competing providers of video programming, one household almost universally is served by only one of those providers. By contrast, in virtually every television market, there are several independently owned television stations providing different "voices" to every television household that can receive the stations' signals.

9. Attached to this affidavit as Exhibit A is a chart showing the number of subscribers served by the 20 largest MSOs. The largest cable operator is Tele-Communications, Inc., or TCI. TCI and its affiliates control cable systems serving 12,334,000 households. That represents 22.5 percent of all households served by cable systems and 13.4 percent of all American television households. The five largest MSOs together control the television viewing in 46.7 percent of all cable households, and 27.8 percent of American television households. The twenty largest cable companies serve 74.3 percent of cable homes, representing almost half of all television households. Thus, cable television now is the provider of video services to almost two thirds of American households and more than two thirds of all cable subscribers are served by the top 15 cable operators.

10. Cable sysem ownership frequently is also concentrated regionally. In many television markets, one or two MSOs own or control virtually all of the cable systems serving the market. In those situations, the decision of a single cable operator to carry or drop a signal will govern the information and viewpoints the vast majorty of households in a region will receive.

11. In some cases, this results in one individual having the ability to dictate which information reaches millions of Americans. For example, TCI and its programming decisions are dominated by one individual, John Malone. The programming decisions of the third and fourth largest MSOs, Continental and Cablevision Systems, also appear to be controlled by one individual at each company, Amos Hostetter and Charles Dolan, respectively. Comcast and Jones Spacelink, the fifth and seventh largest operators, also appear to be directly and centrally controlled by the individuals who founded the companies or their families. Should any of these individuals determine that they objected to information or a point of view expressed on a broadcast channel, they would be able to prevent viewers of their cable systems from being exposed to that information or viewpoint.

III. *Legislative Record Supporting Congressional Findings*

12. I am familiar with the congressional findings set forth in Section 2 of the Cable Consumer Protection and Competition Act of 1992. I am also generally familiar with the legislative record on which those findings were premised. That record was the product of at least 13 hearings and well over a hundred witnesses.[1] Representa-

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[1] *E.g., H.R. 1303 (Consumer Protection and Competition) and H.R. 2546 (Communications Competitiveness and Infrastructure Modernization): Hearings before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, U.S. House of Representatives,* 102d Cong., 2d Sess. March 20, June 18, June 27, 1991; *S. 12: Hearing before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, U.S. Senate,* 102d Cong., 1st Sess. (March 14, 1991); *S. 1880: Hearing before the Committee on Commerce, Science and Transportation, U.S. Senate, on S. 1880 (April 1990); Hearing before the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 2d Sess. (March 1990); *The Federal Communications Syndicated Exclusivity Rules: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation,* 101st Cong., 1st Sess. (101-689)

tives of the broadcast industry, the cable industry and other interested groups had an ample opportunity to testify at those hearings and submit evidence to Congress, and took full advantage of that opportunity. Additionally, Congressional committees took note of, and relied upon, the voluminous submissions made to the Federal Communications Commission ("FCC") in various proceedings involving issues of cable regulation. NAB participated in hearings before Congress and in relevant FCC proceedings, and has submitted a substantial volume of evidence relevant to the must carry issue.

13. One part of that evidentiary record consists of materials submitted to the FCC in various proceedings, including MM Docket 90-4, MM Docket 89-600, in MM Docket 88-138, and MM Docket 85-349. This information, which constitutes only a small part of the evidentiary record assembled by Congress, is all a matter of public record, and is available from the FCC.[2] Those Comments reflect evidence filed by NAB and other parties,

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(March 21, 1990); *Oversight of the 1984 Cable Telecommunications Act: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (101-464) (November 16-17, 1989); *"Must-Carry": Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (101-427) (October 25, 1989); *Commercial Time on Children's Cable T.V.: Hearing before the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (October 1989); *Media Ownership: Diversity and Concentration: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (June 14, 21 and 22, 1989).

[2] Attached as Exhibit to this Affirmation are excerpts from NAB's Comments and Reply Comments in FCC MM Docket 90-4, which contain factual information relevant to the need for must carry requirements. These Comments and Reply Comments, which were submitted to Congress, also reference numerous other submissions in other FCC dockets, many of which are cited in this Affirmation.

particularly the Association of Independent Television Stations ("INTV"), much of which contained additional material relevant to the must carry issue. The Comments were often independently submitted to Congress in the course of its consideration of must carry legislation. The cable industry participated in all of these proceedings before the FCC. Many of the Comments filed by broadcast interests addressed the arguments raised by the cable industry against must carry, both at the FCC and before Congress.

A. *Cable Monopoly Power*

14. The legislative record contains ample evidence supporting Congress's findings that cable operators have achieved "undue market power . . . as compared to that of consumers and video programmers," § 2(a)(2), and that "the cable television industry has become a dominant nationwide video medium," § 2(a)(3).

15. The record includes the following evidence documenting the lack of competition in the market for providing cable services:

a. Testimony of the Honorable Sharpe James on behalf of the National League of Cities and U.S. Conference of Mayors, "Oversight of Cable TV" Hearing, at 191;

b. Testimony of Edward Fritts, President of NAB, "Must Carry" Hearing, at 40;

c. Testimony of Gene Kimmelman on behalf of the Consumer Federation of America, "Cable TV Consumer Protection Act of 1991" Hearing, at 271 (quoting a tax court brief submitted by TCI, Inc., the largest owner of cable systems in the country);

d. Comments and Reply Comments of NAB in FCC MM Docket No. 89-600, containing *e.g.* Malarkey-Taylor Associates, Economic Analysis

of Cable Overbuilds (1987); Noam, Economies of Scale in Cable Television: A Multiproduct Analysis, in *Video Media Competition: Regulation, Economics and Technology* (Colum. U. Press 1985); Milton Maltz, Testimony before Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, U.S. Senate (March 17, 1988);

e. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service ("1990 Cable Report"), 5 FCC Rcd. 4962 (1990).

16. The legislative record also contains the following evidence documenting that cable has become an essential gateway for access to video programming consumers by broadcasters and others:

a. Testimony of Edward Fritts, "Must Carry" Hearing, at 38-39 and sources cited therein;

b. Testimony of Preston Padden, "Must Carry" Hearing, at 61-63 and sources cited therein;

c. Testimony of the Honorable Sharpe James on behalf of the National League of Cities and U.S. Conference of Mayors, "Oversight of Cable TV" Hearing, at 191;

d. Information filed by broadcasting and cable interests in FCC MM Docket 85-349;

e. ELRA Group, Inc. "Outdoor Antennas, Reception of Local Television Signals, and Cable Television" (January 28, 1986);

f. NAB Comments and Reply Comments in FCC MM Docket 88-138;

g. Views of Commissioner Quello in FCC Memorandum Opinion and Order, MM Docket 85-349 May 1, 1987).

17. In particular, the record before Congress contains extremely persuasive evidence supporting Congress's finding that "alternative distribution systems, such as 'A/B' input selector antenna system is not an enduring or feasible method of distribution and is not in the public interest." § 2(a)(18).

18. The broadcasting *and cable* industries submitted studies to the FCC demonstrating that A/B switches are not acceptable as a substitute fo. carriage of broadcast signals on cable systems.[3] These showed that among the reasons why A/B switches do not present an effective alternative to cable carriage are:

a. Many cable subscribers disassemble their outdoor antennas when they subscribe to cable; other subscribers are prevented from using outdoor antennas by zoning or planned unit development restrictions;

b. Where terrain or distance make off-the-air reception difficult or impossible even with an outdoor antenna, cable is the only way to receive broadcast signals;

c. A/B switches are complex to install, particularly when a VCR is also hooked up to the consumer's television;

d. Remote controlled A/B switches costing about 40 dollars have only recently become available, which means consumers have to go to the time and expense of purchasing and installing the extra remote control, or have to go to their television to change services, either of which is a substantial impediment to using the antenna;

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[3] *See, e.g.*, Comments of NAB, FCC MM Docket No. 88-138, at 23-30; Comments of NAB, FCC MM Docket No. 85-359, at 15-21 & Exh. 1; Comments of the Television Operators Caucus, FCC MM Docket No. 85-359, App. B; Joint Petition for Reconsideration filed by NAB, NCTA & CATA, FCC MM Docket No. 85-349.

e. On "cable-ready" televisions connected to a cable system, the UHF channel positions on the set's tuner are set to receive typical cable frequencies, not UHF frequencies, so a switch on the television would have to be adjusted in addition to the A/B switch.

19. NAB and INTV jointly commissioned a survey of cable subscribers to determine how many have an input selector switch and what proportion of cable subscribers have used it. The results are reported in a study submitted by NAB. *See* Fratrik, "A-B Switch Availability and Use," Sept. 23, 1991 (*see* Exhibit D). The results of that study were compared with the 1986 study of A/B switch usage conducted by the ELRA Group.[4] In that study, only 1.5% of all cable homes were found to have ever used an A/B switch to change between cable and off-the-air television service. In the 1991 study, only 6% of cable households in 1991 report ever having used an A/B switch, despite five years of FCC-mandated consumer education about A/B switches.

B. *Incentives for Anticompetitive Conduct by Cable*

20. The record before Congress strongly supports Congress's findings that "cable operators have the incentive and ability to favor their affiliated programmers," and that "there is an economic incentive for cable systems to terminate the retransmission of broadcast signals, refuse to carry new signals, or reposition a broadcast signal to a disadvantaged channel." §§ 2(a)(5) & (15). That evidence consists, in part, of the following:

a. Testimony James B. Hedlund, "Cable TV Consumer Protection Act of 1991" Hearing, at 214

[4] "Outdoor Antennas, Reception of Local Television Signals and Cable Television," ELRA Group, Inc., Jan. 28, 1986, submitted as Exh. 1 to the Comments of NAB, MM Dkt. No. 85-349 (filed Jan. 29, 1986).

(describing the decision of TCI, the largest owner of cable systems, to drop the Learning Channel in favor of a station in which TCI had an ownership interest);

b. NAB comments in MM Docket 88-138 (including, Michael O. Wirth, The Economic Impact of Cable on Broadcasting (1988), and Gary M. Fournier, An Economic Analysis of The Appropriateness of a New Must-Carry Rule for Broadcast Stations and Cable Operators (1986) ("When programs are highly substitutable the cable operator recognizes that the total effect on profits of carrying the local station includes the negative impact the local station has on profits earned from other offerings. The negative impact includes the reduction in both the subscriber's willingness to pay for other programming and in the local cable system's revenues from local advertising.")));

c. Testimony of FCC Commissioner Quello Hearing of Subcom. on Telecom and Finance, Committee on Energy and Commerce, U.S. House of Representatives, 100th Cong., 2d Sess. (May 11, 1988) ("There is an increasingly strong incentive for cable to drop local broadcast signals.");

d. NAB Reply Comments in MM Docket 88-138;

e. Testimony of Ass'n of National Advertisers, "Cable TV Consumer Protection Act of 1991" Hearing, at 351;

f. Testimony of Daniel Jaffe on behalf of the Ass'n of National Advertisers, "Must Carry" Hearing, at 144.

C. *Anticompetitive Conduct by Cable*

21. The legislative record strongly supports Congress's findings that "there is a substantial likelihood that absent

the reimposition of . . . [must carry] requirement, additional local broadcast signals will be deleted, repositioned or not carried." § 2(a)(15). That evidence consists, in part, of the following:

a. Cable system Broadcast Signal Carriage Survey" Staff Report by Policy and Rules Division, Mass Media Bureau, 9/1 88. (attached as Exhibit B hereto);

b. Testimony of Brian Holton, General Manager, KTSF(TV), San Francisco, "Must Carry" Hearing, at 161-74;

c. Testimony of Edward Fritts, "Must Carry" Hearing, at 41;

d. Comments and Reply Comments of NAB in FCC MM Docket No. 89-600, which refers to FCC MM Docket No. 88-138, Comments of NAB, July 8, 1988;

e. Testimony of James Hedlund, "S.12" Hearing, at 218-19;

f. Testimony of James Hedlund, "Must Carry" Hearing, at 222 (INTV's sampling of TCI repositioning showed that 65 of 70 repositioning replaced local broadcast stations with cable networks in which TCI had an equity interest);

h. Testimony of James Hedlund, "Must Carry" Hearing, at 214 (Cable systems favor networks in which they own an interest and exert influence against others, such as CNBC and the Learning Channel) and 225 (In almost every instance, the higher rated station was shifted);

i. INTV, Free Television Under Siege: Typical and Illustrative Case Histories of Anticompetitive Conduct by Cable Television Systems, May 1988 (copy attached hereto as Exhibit C);

j. Comments and Reply Comments of NAB, INTV, Chris-Craft, and The 97 Stations in FCC MM Docket 89-600;

k. NAB Comments in FCC Docket 88-138.

22. Comments filed by NAB, INTV, KTFH-TV, Trinity Broadcasting Network, APTS, WCOM-TV, Chris-Craft Industries, KWBI and Leon A. Crosby, in FCC MM Docket No. 89-600 document a continuing pattern of cable operators manipulating the carriage and channel positioning of local stations for anticompetitive purposes.[5] For example, after $3 million was spent to put WCOM-TV, Mansfield, Ohio on the air, it went dark in 16 months, having been "bled to death" as a result of being able to obtain carriage on only a fraction of the cable systems in the area."[6] KTFH reported that it

> "has not been able to come out of its bankruptcy since it was filed over two and one half years ago despite the fact that KTFH-TV's experienced management team has been able to operate the station on an extremely low overhead cost of $107,000 per month. The lack of cable carriage has prevented the station from generating enough income to service its debt of $3,000,000."[7]

Having been denied cable carriage on all Denver area cable systems, KWBI stated that: since commencing oper-

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[5] *See* Comments of NAB at 25-31; Comments of INTV at 48-52 and Exhibits B and C; Comments of Lesea at 3-17; Comments of KTFH-TV at 2-8; Comments of Trinity Broadcast Network (reporting that its stations have been removed from 22 cable systems serving 5.5 million viewers and have been denied access to another 900,000 subscribers since the demise of must carry) at 4-5; Comments of APTS at 14-16; Comments of WCOM-TV at 1-2; Comments of Chris-Craft Industries at 10-14; Comments of KWBI at 3-5; Comments of Leon A. Crosby at 2-5.

[6] Comments of WCOM-TV at 1 & 2.

[7] Comments of KTFH-TV at 1, 2.

ations in 1988, it has continuously encountered deficits; that "there is no other factor more important to the viability of this station than cable carriage"; and that it is in a "survival mode" and would probably go dark if local carriage is not obtained in the next two years.[8]

23. Other comments in FCC MM Docket 89-600 contain similar evidence. TCI systems in the San Francisco area repositioned the signal of Station KBHK-TV. KBHK has been repositioned almost annually on some of the San Francisco area cable systems.[9] At one time, it had arranged for its signal be carried on channel 12 on almost all local cable systems; indeed the station promoted itself as "Bay Area Cable 12." All local TCI systems subsequently repositioned KBHK to varying channel positions. In May 1989, KBHK was moved on the San Carlos system from channel 19 to channel 23. On the Sunnyvale system, the station was shifted from channel 22 to channel 24. The Fremont system moved it from channel 22 to channel 23. These changes were made without any prior notice to the station. Again, there can be no explanation for such minor and repeated shifts except an effort to reduce the audience of a local station to the benefit of the cable operator.

24. Comments in FCC MM Docket 88-138 confirm the pattern of anticompetitive conduct. NAB Comments filed in July 1988 documented the demise of WCVX-TV and WVUW-TV in Massachusetts because of their inability to obtain local carriage, and reported that WFAT (later WPTJ-TV), Johnstown, Pennsylvania, had been driven into Chapter 11 bankruptcy because "drops and cable channel shifts have progressively weakened our economic viability." [10] Leon Crosby, former licensee of WPTJ

[8] Comments of KWBI at 2, 7, 8.

[9] Comments of Chris-Craft Industries, MM Dkt. No. 89-600 (filed March 1, 1990).

[10] NAB Comments in MM Dkt. No. 88-138 at 35 and 36.

and a broadcast veteran of 40 years, reported that "WPTJ went dark in mid-1990 after being on the air continuously for over thirty years," having been "literally forced off the air by the harsh treatment it received from the cable systems located in the Johnstown-Altoona area." [11]

25. Comments filed in FCC MM Docket 90-4 further confirm the pattern of anticompetitive conduct by cable operators. These comments include the following examples:

a. KVVT-TV, Victorville, California, is the only local television station operating in the High Desert area of Southern California, an area which includes the communities of Palmdale and Lancaster. KVVT provides coverage of those communities as part of its service; no other television station carries local coverage. Because of terrain problems and restrictions on outdoor antennas, many homes in the Palmdale/Lancaster area cannot receive KVVT over the air. Since 1987 when the interim must carry rules were invalidated, Jones Intercable has either denied KVVT carriage on the Palmdale/Lancaster cable system or demanded concessions from KVVT in exchange for such carriage.[12]

b. Station KMTR(TV), Eugene, Oregon, recently constructed two full power satellite stations to extend its signal, and also sought to have the satellite stations carried on cable systems in their areas. In Coos Bay, where one of the satellites operates, cable penetration exceeds 82 percent, making cable carriage essential if the station is to have any audience at all. The Coos Bay cable system carried two NBC affiliates from adjacent

[11] Comments of Leon A. Crosby at 1, 5, 6, in MM Docket 90-4.

[12] *Sunbelt Television v. Jones Intercable, Inc.*, 795 F. Supp. 333 (C.D. Cal. 1992) (denying motion to dismiss).

markets which did not provide local programming. It refused originally to carry the new facility and only agreed to do so after the licensee agreed to numerous valuable concessions.[13] In effect, in order to get access to the audience it is licensed to serve, the station is required to subsidize the cable system which is its principal competitor.

c. WYST-TV, Syracuse, New York, is the Fox affiliate in the Syracuse area. Despite the attractiveness of its programming, the station was forced to give up valuable rights in order to be carried or to maintain its channel position on many cable systems within its coverage area.

d. The control of the cable system in Fergus Falls, Minnesota was assumed by TCI. As part of its introduction of the ENCORE service, a pay service owned by a TCI affiliate, the cable system dropped carriage of KXJB-TV, Fargo, North Dakota. The cable system explained that its viewers could receive CBS network programming over another affiliate carried by the cable system. That station, however, provides much less coverage of the Fergus Falls area than KXJB. In response to complaints about the lack of local weather information on the other CBS station, cable system officials suggested that viewers watch The Weather Channel, a national cable program service.[14]

e. In Iowa and Minnesota, other TCI-owned systems engaged in widespread dropping and replacement of network stations at the time ENCORE was introduced. The TCI system in Washington County, Iowa for many years carried the signals

[13] Comments of KMTR, Inc., MM Dkt No. 90-4 (filed Aug. 14, 1991).

[14] "Viewers Cite Ties to Fargo at TV Session," *Fergus Falls Daily Journal*, May 25, 1992.

of the three network affiliates in Cedar Rapids, and Washington County was included in the Cedar Rapids area. TCI dropped carriage of the Cedar Rapids ABC and NBC affiliates, substituting for them one signal from the Davenport-Rock Island market and one signal from Des Moines. Thus, the network affiliates carried on the Washington system come from three different television markets. Although the Quad cities station is not much further from Washington than Cedar Rapids, the Cedar Rapids stations cover the Washington area, while the substitute station does not. The Des Moines station is more than 150 miles from Washington County.

f. In the Mason City-Rochester-Austin area, TCI systems engaged in a pattern of dropping the signals of affiliates within the area and picking up stations from outside the area which do not provide local service to the cable community.

g. The Algona, Iowa system dropped the signals of stations KAAL-TV, Austin, and KTTC-TV, Rochester. Algona is in the Mason City-Rochester-Austin area. The cable kept the signals of WHO-TV, Des Moines, and WOI-TV, Ames, Iowa, both of which are in different areas. KAAL's president wrote: "We are the second rated station in the county. We carry the weather and Tornado alerts for Algona, we carry local news, local sports and other local event news. Des Moines ABC will never cover these things. And Des Moines weather doesn't relate in any way to Algona's weather." [15]

[15] Letter from Robert C. Dix, Jr., Dix Communications, to Robert Thomson, Vice President, TCI, May 9, 1991; *see* Letter from the Algona City Council to Senator Tom Harkin, June 12, 1991.

h. Station KDOC-TV, Anaheim, California, reported numerous instances of being dropped or repositioned by cable systems. In some cases, the repositioning involved a change of only one or two channel numbers. There can be little reason for a cable system to reorder its channel lineup so incrementally other than to make it more difficult for subscribers to find local channels, and thus to weaken local stations.

D. *Harm to Broadcasting*

26. The evidence before Congress strongly supports Congress's finding that "with the absence of a requirement that such systems carry local broadcast signals . . . the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." § 2(a)(16). That evidence consists, in part, of the following:

a. Testimony of Preston Padden, "Must Carry," at 57 (describing how the growth of new stations has been brought to an "absolute halt");

b. Testimony of Preston Padden, "Must Carry" Hearing, at 79 ("Broadcast stations are the quintessential democratic medium, available equally to rich and poor");

c. Testimony of the City of New York, Bureau of Franchises, "Must Carry" hearing, at 176 (Without cable carriage, viewing declines, it becomes impossible to finance local programming and there is nothing left for the low-income brackets who do not have cable);

d. Testimony of James Hedlund, "Must Carry" Hearing at 206.

e. Testimony of NAB, "Must Carry" Hearing, at 33.

IV. *FCC Views on Severability of Retransmission Consent*

27. Attached to this Affirmation at Exhibit E is a true copy of a page of the November 6, 1992 *Communications Daily* newsletter which reflects that, at the meeting of the Federal Communications Commission on November 5, 1992, Commissioner Duggan asked whether the must carry and retransmission consent provisions of the 1992 Cable Act were severable, and that the Chief of the Mass Media Bureau indicated the Commission's conclusion that the two provisions are severable. Also attached at Exhibit E is a transcribed portion of the November 5, 1992 meeting of the Federal Communications Commission during which the exchange reported on in *Communications Daily* took place. I have compared the transcript with a tape of the meeting made by my office during the meeting. The transcript accurately reflects the discussion that took place.

28. On November 19, 1992, the Federal Communications Commission released the text of its *Notice of Proposed Rulemaking* in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, MM Docket No. 92-259. At page 2 of the *Notice*, the Commission describes the relationship between the must carry and retransmission consent provisions of the Act, stating as follows:

> "Although the provisions are related by virtue of that option [to elect between must carry and retransmission consent], they are otherwise substantively quite distinct, with each provision functioning in a separate fashion once a selection is made. Thus, the inclusion of both issues in a single proceeding is simply a matter of administrative convenience and not an indication that the matters are not severable."

IV. *Risk of Association of Views*

29. There is no significant risk that viewers of programming provided by a cable system will believe that broadcast programming carried over that system pursuant to must carry requirements is conveying ideas, messages or points of view endorsed by the cable operator. Federal Communications Commission regulations require broadcasters to identify themselves when signing on and off each day, and at least once every hour during the day. 47 C.F.R. § 73.1201. Cable has a long history of serving as a conduit for broadcast channels, and consumers know that broadcast programming on a cable system is not the expression of the cable operator. Furthermore, cable operators have ample opportunity to use disclaimers should they feel any need to dissociate themselves from particular broadcast stations or messages.

I affirm under penalty of perjury that the foregoing is true and correct:

/s/ Jack N. Goodman
JACK N. GOODMAN

November 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF MICHAEL C. RAU

DISTRICT OF COLUMBIA: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity on cable systems. Briefly, technology improvements and increased customer expectations have resulted in a

strong and unmistakable trend toward expanding channel capacity on cable television systems, especially at franchise renewal time, developments which make displacement either unlikely or unnecessary. Even without exploiting new technologies such as fiber optics and signal compression, today's cable and electronics technology easily allows substantial improvements in channel capacity. Often even the most primitive systems, with only 12-22 channels, can be upgraded to provide 40 channels without overhauling the system. Most new builds and rebuilds are for high capacity systems which can provide at least 80 channels. Some systems are now appearing with capacity of 150 channels or more.

4. There are two new technologies which are being used to dramatically expand the channel capacity of cable television systems: fiber optics and video compression. Installation of fiber optic networks is already proceeding for many cable operators. The capacity on optical fibers is only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to 80 NTSC television signals. NTSC is the current technical standard for U.S. television signals.

5. Video compression provides the greatest promise for long term expansion of cable channel capacity. Cable Laboratories (CableLabs), a technical facility funded completely by the cable industry, is evaluating standards proposals to develop a system for delivering compressed television signals from the cable head-end to consumers. Compression technologies already exist which can fit 4 NTSC quality video signals in an existing 6 MHz television channel. CableLabs expects to have a system available for cable operators' use by 1994.

6. Therefore, industry trends are combining with new technologies to expand the capacity of cable television systems. Systems such as the one in Queens, New York, with 150 channels, are pointing the way to the future. If

technology developments continue as most experts expect, compression will allow channel capacity on a cable television system to be multiplied by a factor of four, with compression equipment availability expected by 1994. Cable operators, foreseeing the imminent arrival of excess capacity, are exploring how to use these channels to branch out into personal communications and other businesses. A more detailed description of these developments follows.

Background

7. Channel capacity for a cable television (CATV) system is limited by the bandwidth available in the system. Every television channel carried on a cable system requires 6 MHz of bandwidth. Total system bandwidth, in turn, is limited by the physical properties of the cable system equipment.

8. A cable system can be divided into 5 parts: (1) the headend, (2) the trunk, (3) the distribution system, (4) the drop cable, and (5) the customer premises equipment.[1] The trunk is the long backbone cable that runs through the system to within a mile or so of each subscriber. The distribution system distributes the signal from the trunk throughout the various neighborhoods served by the system. The drop cable is the line which connects an individual subscriber to the cable distribution system.

9. The bandwidth of a system is limited by the trunk and, to a lesser extent, the distribution system and the drop cable. Only 14% of all cable footage is in the trunk.[2] Thus, when cable systems are upgraded to expand their channel capacity, most of the existing cable is left

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[1] Ciciora, *An Overview of Cable Television*, National Association of Broadcasters Engineering Handbook, 731, 732 (8th ed. 1992).

[2] *Id.* at 746.

intact.[3] This has made it easy and commonplace for cable systems to increase their capacity as technology has improved.

Current CATV Capacity

10. Because the cable and electronic components used in CATV systems are fairly standardized, these systems tend to operate at a few bandwidth plateaus. On the lowest plateau are very old, small systems which operate at an upper frequency of 220 MHz, yielding up to 22 channels of capacity.[4] On the upper plateau are modern, urban systems operating at 1 GHz with over 150 channels of capacity.[5] In between are plateaus at 330 MHz, 450 MHz, 550 MHz, and 750 MHz with capacities of up to 40, 60, 80, and 110 channels respectively.[6]

11. No more than ten percent of cable plant today operates at the lowest capacity plateau of 22 or fewer channels.[7] Even these systems can be, and often are, upgraded to 330 MHz and 40 channels without a complete rebuild. Seventy-five percent of cable plant today consists of systems with 330 MHz bandwidth and up to 40 channels of capacity. However, few new systems are

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[3] *Id.*

[4] In figuring the channel capacity of a cable system, not all frequencies are used for distribution of video programs. The lower 54 MHz, as well as 20 MHz for the FM radio band, are not occupied with television signals. Another two 6 MHz channels, designated A1 and A2, are typically used for isolating system faults. Thus a system with a 220 MHz upper bandwidth limit has capacity for: (220-54-20-12)/6=134/6=22 channels.

[5] *See, e.g.*, Jesuale, *Video on Demand: Cable's Next Step?*, TV Technology, Sept. 1992 at 1, 48. The Time-Warner system in Queens, New York provides 150 channels of programming, went on-line in February 1992 and uses fiber optics in its trunk.

[6] *See* Ciciora, *supra* note 1, at 736.

[7] *Id.* at 736, 738.

built with the limited capacity of a 330 MHz system.[8] Most new systems are built with bandwidths of 550 MHz providing 80 channel capacity.[9] Already, 15% of existing cable plant is in the "high capacity" category.[10]

Trends

12. Bandwidth expansion in CATV has been routine since the early days of cable.[11] Clearly the trend is for new systems and rebuilds to expand bandwidth to 550 MHz or more with a capacity of at least 80 channels.[12] This trend is being driven by consumer demands,[13] and technology improvements.[14]

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[8] *See id.*

[9] *See* Moloney, Schilling, and Marz, *Expanded Bandwidth Requirements in CATV Applications*, 1992 NCTA Technical Papers 200, 201 [hereinafter *Expanded Bandwidth*] (noting the rapid expansion of cable system bandwidth "to the current standard level of 550 MHz").

[10] Ciciora, *supra* note 1, at 738.

[11] *Expanded Bandwidth*, *supra* note 9, at 201. The authors note that bandwidth, and hence capacity, has doubled every 12-15 years.

[12] *See, e.g., Expanded Bandwidth*, *supra* note 9, at 200; Brugliera, *Compression and its Impact on Cable*, Communications Technology, May 1992, at 18; Vaughan, *Upgrades with Fiber: Selecting Cost-Effective Architectures*, 1991 NCTA Technical Papers 273.

[13] *See, e.g.*, Brugliera, *supra* note 12, at 18 (noting the growth in available programming choices); Ciciora, *Scenarios for Compressed Video in Cable Practice*, 1991 NCTA Technical Papers 123. Ciciora maintains that "[w]hen given a choice, the American consumer has always chosen "more" over "better." He points out that most VCRs are used in the six hour "EP" format despite "the noticeably superior video and dramatically better audio" available in the two hour "SP" mode. *Id.*

[14] See Chiddix and Vaughn, *Upgrading Coaxial Distribution Networks with Amplified Taps*, 1991 NCTA Technical Papers 245 (discussing how low cost fiber technology is allowing 1 GHz systems to be built); Brugliera, *supra* note 12, and 18 (noting that steady advances in technology are extending cable plant bandwidth beyond 350 MHz and 450 HMz bandwidths).

13. This high-capacity trend is reported in a recent poll by Midwest CATV and *Cablevision*.[15] The poll of 200 general managers revealed that 43% of the managers would upgrade or rebuild their system in 1993.[16] An earlier poll showed that 36% planned to modernize in 1992.[17] Of the managers planning upgrades or rebuilds, 78% said that they would be expanding the capacity of their systems. And 15% of those surveyed will be expanding their systems to a 1 GHz bandwidth and its capacity for 150 channels.[18] 14. Thus, steady bandwidth and channel capacity expansion has been, and continues to be, the trend for all cable systems. Customer demands and technology improvements have fueled this expansion. However, two new technologies, *fiber optics* and *video compression*, promise to turn this slow, steady expansion into an imminent explosion in available capacity.

New Technologies for Expanding Channel Capacity

15. Fiber optics and video compression are two revolutionary new technologies which are being used to expand the channel capacity of cable television systems. Fiber optics expands the effective bandwidth of the cable system. Video compression makes more efficient use of whatever bandwidth is already available in the system. If a CATV system is analogized to a water distribution system, then adding fiber optics is like using a bigger pipe, and adding signal compression is like using a more powerful pump.

16. The combined impact of these technologies is an imminent explosion in channel capacity on CATV systems. Indeed, the impact of fiber optics alone on cable

[15] *Building Blocks*, Cablevision, September 21, 1992, at 44.

[16] *Id.*

[17] *Id.*

[18] *Id.*

television has been compared to the tremendous growth of cable television popularity following its marriage to satellite technology in the 1970's.[19] "Technology is making channel capacity ubiquitous and low cost." [20]

Fiber Optics

17. Installation of fiber optic networks in CATV systems is now commonplace.[21] Fiber optics is an extremely cost-effective approach to upgrading a cable trunk.[22] The capacity of an optical fiber is, in practice, only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to 80 NTSC television signals.[23] Many systems are built

[19] Mattson, *Fiber to Feeder Design Study*, 1991 NCTA Technical Papers 309, 319.

[20] Pollack, *Packing Cable with Programs*, New York Times, January 22, 1992, at D1 (quoting Mr. Craig Tanner, Vice President for Advanced Television Products at Cable Television Laboratories (CableLabs)).

[21] *See, e.g.*, Holobrow, Bohn, and Das, *Passive Optical Network (PON) Architectures and Applications*, 1992 NCTA Technical Papers 364 (noting that "fiber systems have supplanted coaxial trunking in most new and rebuild construction in the last two years."); Ciciora, *supra* note 1, at 738, 7[illegible] 746 (noting that optical fiber is now "frequently used" in cable systems as part of upgrades, rebuilds, and new builds).

[22] *See*, Ciciora, *supra* note 1, at 746 (noting that some studies have shown that the cost of upgrading a system's trunk to fiber is less than $25 per subscriber). *See also* McGrath, *The Evolution of Broadband Hybrid Networks*, 1992 NCTA Technical Papers 124, 126 (proclaiming that, "[f]iber trunking/coax distribution . . . with analog bandwidths of 600 MHz (to a demonstrated top of 1 GHz) is now the architecture of choice.").

[23] *See, e.g.*, Weinschenk, *Jerrold to Extend Starfire Family*, Cable World, April 20, 1992 at 62; Kearns, *An 80-Channel High-Performance Video Transport System Over Fiber Using FM-SCM Techniques for Super-Trunk Applications*, 1991 NCTA Technical Papers 71.

with several fibers bundled together for even greater capacity.

18. In fact, fiber use has been proposed to interconnect cable systems with one another.[24] In this vein, Adelphia Communications is currently building a 165 mile, 1 GHz fiber optic loop around the state of Vermont.[25] And New Jersey Bell recently announced a partnership with Sammons Communications to build a fiber-to-the-curb (FTTC) system to 11,700 customers in New Jersey.[26]

19. Once installed, fiber eliminates the capacity bottleneck on the cable trunk. In fact, many cable industry executives see the tremendous capacity made available by fiber as a tool to allow them to expand into the telephone and personal communications industries.[27] Tele-Communications, Inc. has been testing personal communications networks (PCNs) with McCaw Cellular in Oregon.[28] Meanwhile, CableLabs has formed a PCN Technical Advisory Subcommittee to explore provision of these services using the excess capacity on cable networks.[29]

20. In addition to PCN, cable executives appear to want to use their new-found excess capacity to provide more pay-per-view channels.[30] In fact, in one almost un-

[24] Stratton, *A Future Without Satellites*, Cable Television Business, July 1, 1990, at 20A.

[25] *See, Ring Around the State*, Cablevision, September 21, 1992, at 40.

[26] Communications Daily, November 17, 1992, at 6.

[27] Hart, *Cost Effective Cable Television Transport for PCN*, 1992 NCTA Technical Papers 148; Gitten, Albagli, and Walker, *Planning CATV-Based Personal Communications Networks*, 1992 NCTA Technical Papers 129.

[28] *Impact of Fiber Optics*, Communications Technology, May 1992, at 28, 40.

[29] Dukes, *CableLabs 1991 Advanced Network Development Work*, 1991 NCTA Technical Papers 232, 234.

[30] *See, e.g.*, Brugliera, *supra* note 12, at 18; *Multiple Channels Planned*, TV Digest, September 21, 1991, at 7.

believable trial, Comcast and Jerrold have teamed to design a system that would dedicate 25 channels to a single movie, with start times rotating at 5 minute delays.[31] Indeed the Time-Warner 150-channel cable system in Queens, New York includes 57 channels of pay-per-view.[32]

21. Fiber is available, cost effective, and is being used in most CATV trunk construction today. It is expanding cable system capacity beyond the number of conventional programming services available to cable systems today. The result is that plans are in the works to use the excess capacity for PCN, pay-per-view, and other subscription services.

Video Compression

22. If fiber optics is a crowbar to pry open previous bottlenecks in CATV systems, then video compression is a sledgehammer to smash the bottleneck to pieces. Fiber optics adds capacity to a cable system. Video compression literally multiplies that capacity by a factor of four or more. Video compression is the future of virtually every video transmission and storage system from CATV to High Definition Television (HDTV). And video compression has already moved from the laboratory to the marketplace.

23. Video compression eliminates redundancy and irrelevancy in video signals, thus reducing the bandwidth required for their transmission. An NTSC television signal requires 6 MHz of bandwidth, but it is possible to fit six compressed NTSC signals in that same 6 MHz bandwidth.[33] Thus, even a very limited capacity cable

[31] Jesuale, *supra* note 5, at 48.

[32] *Id.* at 48.

[33] *See, e.g.*, Weinschenk, *DigiCipher Gear Wins High Marks*, Cable World, September 21, 1992, at 46; *Westcott and NTU—Important End Users*, Satellite News, November 2, 1992, at 4; Communications Daily, September 16, 1992, at 5-6.

system operating at 220 MHz could be upgraded to provide over 100 video channels *without replacing the existing cable plant*.[34] And 1 GHz systems will be able to provide over 500 channels of television programming. Although decompression converters would need to be provided for every customer, Hal Krisbergh, President of Jerrold, has estimated that these boxes will only cost about 35% more than existing boxes.[35]

24. Video compression is already being installed in satellite transmission systems for cable programming distribution. National Technological University and Westcott Communications have recently converted to Compression Lab's SpectrumSaver system.[36] Meanwhile Rogers Cable has been using the General Instruments DigiCipher compression system since July 1992 to provide 4 video signals over a single transponder.[37] Cablevision Systems and Multivision of Mexico have also selected the DigiCipher system.[38]

25. The migration of compression from the satellite feed to the cable distribution system would appear to be imminent. All of the systems being considered by the Federal Communications Commission for a U.S. standard for terrestrial HDTV use video compression, thus ensuring that integrated circuits will be mass produced as an important component of the next generation of home receivers.

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[34] *See* Tanner, *Digital Compression and Transmission: A Primer for Non-Technical Readers, Specs*, October 1992, at 3.

[35] Weinschenk, *Digital Compression: No Sure Thing*, Cable World, April 27, 1992, at 30.

[36] *Westcott and NTU—Important End Users*, *supra* note 33, at 4.

[37] Weinschenk, *supra* note 33, at 46.

[38] Lambert, *Digital Compression Now Arriving on the Fast Track*, Broadcasting, July 27, 1992, at 40; *Multivision to Use Digicipher*, TV Digest, June 8, 1992, at 7.

26. Most experts are in agreement that video compression is coming soon to CATV systems and will be cost effective. CableLabs joined with Viacom, Tele-Communications, Inc. (TCI), and the Public Broadcasting System (PBS) to issue a request for proposals for satellite transponder compression systems in the fall of 1991.[39] The process ultimately led to purchase negotiations between Viacom, TCI, and PBS, and the three compression finalists: AT&T, General Instruments, and Scientific-Atlanta.[40]

27. CableLabs is now focusing on development of headend-to-the-home compression systems.[41] And the experts are predicting that these systems will become available by 1994.[42] John Malone, President of TCI, has opined that compression will have as much impact on the development of the cable industry as did the availability of communications satellites which made national distribution of programming possible.[43]

Conclusions

28. The history of CATV systems has been a steady expansion of channel capacity. Systems are now in place with 1 GHz of bandwidth and 150 channels of capacity.

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[39] Lambert, *supra* note 38, at 40.

[40] *Id.*

[41] *Id.* at 42. CableLabs President Dick Green has said, "In general, I have a lot of faith in the entrepreneurial process that costs are tractable." Weinschenk, *supra* note 35, at 30.

[42] Tony Weselberger, Vice President at Oak Communications, believes compression will hit the market beginning in 1994. Lambert, *supra* note 38, at 44. Mike Harris, Senior Vice President of Century Communications also sees 1994 as a target date for compression in the distribution system. *Building Blocks*, *supra* note 15, at 44. AT&T has also said that their system will be available to cable television operators by 1994. Farhi, *AT&T Announces System to Expand Cable Offerings; Technology Could Allow up to 500 Channels*, Washington Post, May 5, 1992, at C1.

[43] *MSO's Prime Compression*, TV Digest, April 22, 1991, at 2.

These systems are pointing the way to the future. Most new systems and upgrades to old systems are providing at least 80 channels of capacity. This expansion is and will continue to be built on the availability of low cost, wide bandwidth fiber optics.

29. Meanwhile, a tremendous explosion in available capacity is at hand with the introduction of video compression technology. This technology has already moved out of the lab and into the marketplace. As systems are upgraded with video compression, their capacity will be multiplied by a factor of four or more. The outlook is for a future where capacity exceeds available programming. Cable industry executives, foreseeing that result, are investigating new services such as PCN to exploit that excess capacity.

/s/ Michael C. Rau
MICHAEL C. RAU

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF DR. CHARLES E. SHERMAN

District of Columbia: ss

I, Dr. Charles E. Sherman, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Television of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. I have been involved in the television industry, either in an academic position, operating stations, or at the NAB for more than 25 years. I have a Ph.D. in Mass Communications from Wayne State University. From 1967 to 1979, I was a professor of Radio-Television-Film at the University of Wisconsin-Madison and Indiana University. At Indiana, I chaired the Department of Telecommunications. A *curriculum vitae* listing the articles and papers I have written in the field is attached to this affidavit. From 1979 until 1988, I was President and General Manager of Stations WTRF-TV, Wheeling, West Virginia, and WHOI-TV, Peoria, Illinois. I have held my present position since 1988. During this entire period, I have been involved in the issues surrounding cable system carriage of broadcast stations.

3. Cable systems include a variety of signals on their systems. Usually, cable systems carry a selection of local over-the-air television signals. They also may carry some "distant" broadcast television signals which they import from other markets. Cable systems also carry different types of cable programming. Pay cable networks refers to programs like Home Box Office or the Disney Channel. Subscribers usually pay a monthly fee to obtain these particular services. Basic cable networks, by contrast, are usually included as part of a cable system's basic service tier or on a separate tier together with other cable networks. No separate charge is made for each basic cable network.

4. The cable programmer plaintiffs contend that the must carry requirements contained in the 1992 Cable Act will harm their interests by leading cable systems to carry local television station signals instead of allegedly more popular basic cable networks. The affidavits of Terrence F. McGuirk and Lee Masters, attached to the Motion for Preliminary Injunction, demonstrate that must carry rules will have little effect on whether a particular cable program service is carried on a cable system. Both affidavits assert that a present shortage of capacity on some cable systems impedes carriage of their cable services. Must carry rules, however, have not been in effect since 1985. Whatever difficulties cable programmers now have in obtaining carriage has nothing to do with must carry requirements, past or future. Further, while the McGuirk affidavit asserts that the elimination of must carry rules in 1985 had a direct impact on the growth of new cable programming services, Turner's Memorandum in support of its Motion asserts (p. 33) that "[t]he vast majority of cable systems continue to carry a full complement of broadcast stations." If cable systems did not cease carrying broadcast stations after their carriage became optional, as the Plaintiffs claim, it is difficult to understand how the elimination of the rules had any impact on the development of cable program services.

5. The affidavits submitted by the Turner plaintiffs also establish how successful these cable program suppliers have been in obtaining carriage. CNN claims availability in 53,098,655 households (McGuirk aff. ¶ 4); TBS is available to 51,384,100 households (McGuirk aff. ¶ 5); TNT is available to 51,324,881 households (McGuirk aff. ¶ 6); Arts & Entertainment Network is available in 55,600,000 households (Davatzes aff. ¶ 4); Lifetime claims to be available in more than 58 million households (Burchill aff. ¶ 4); The Family Channel can be seen in more than 55.7 million households (Robertson aff. ¶ 4); C-SPAN claims that it can be seen in 58 million households (Collins aff. ¶ 5). Since as of July 1992, Nielsen estimates that there were 56,551,610 total cable households, it is clear that all of these services are provided on the overwhelming majority of all cable television systems. Even if a cable system were required to change its program selection as a result of must carry requirements, it is unlikely that any of these networks, which are among the most popular cable program services, would be affected. It is also worth noting that the Cartoon Channel which Turner seeks to have carried would be the *fifth* channel controlled by Turner on cable systems. Moreover, two of Turner's principal shareholders are Tele-Communications, Inc. and Time-Warner, the Nation's two largest cable operators, who each have ownership interests in many other cable program services. By contrast, with few exceptions, FCC regulations bar one entity from owning more than one television station in a market.

6. Trends in viewing in cable households indicate that, rather than use of channels for over-the-air broadcast signals, the major factor affecting carriage of cable programming networks will be the flat demand for cable networks by cable subscribers. Ratings data on viewing of over-the-air television signals and basic cable networks in cable households indicate that the viewing of basic

cable networks in cable households has declined. By contrast, the viewing of the major over-the-air signals on cable systems has increased in the last year. The February 1992 Nielsen data showed that viewing of basic cable networks in the evening "prime time" hours represented 10.2 percent of the total audiences, as compared with 12 percent the previous year. For the same period, viewing in cable homes of ABC, CBS, and NBC, the three established broadcast networks, increased from 38.5 percent of the audience to 41.9 percent. Thus, basic cable networks as a whole are not only less popular than over-the-air television stations, their relative popularity among cable subscribers is declining. A chart showing this trend is attached to this affidavit.

7. Not only is the viewing of basic cable networks in decline generally, ratings for the more prominent cable networks have either flattened out or, where they have grown, the growth has been at the expense of other cable programs. The Nielsen Cable Activity Report comparing prime time ratings in the second quarter of 1992 with similar data for previous years shows, for example, that while ratings for the TNT network increased from a 1.1 share of all cable households in 1991 to a 1.2 share rating in 1992, during the same period The Nashville Network's ratings declined from a .7 to a .6 share. Pay cable networks show similar results. Home Box Office's ratings climbed one tenth of a percent from 1991 to 1992, but the ratings for the competing Showtime service declined by the same amount. It is apparent that ratings for basic cable networks have generally stopped growing and that any growth in the audience for basic cable network services comes from "cannibalizing" the audience of other basic cable networks. Two charts showing trends in the ratings for various cable program services are attached to this affidavit.

8. Both the Turner Plaintiffs and Daniels assert that the must carry requirements may impel cable systems to

make programming choices which are contrary to viewer preference. Ratings data comparing the viewing of over-the-air stations and cable programming services show, to the contrary, that the least-watched broadcast station almost always is watched by more people than the most-watched cable network. The one exception is when NFL football is carried on the TNT or ESPN cable networks. For example, in the Washington, D.C. market in November, 1990, a comparison of Nielsen ratings data for the three independent commercial television stations and four leading cable networks shows:

	Sign-on/sign-off rating	Prime time rating
Independents		
WTTG	5	8
WDCA	3	3
WFTY	1	1
Cable networks		
ESPN	1	2
TBS Superstation	1	1
TNT	1	1
USA Network	1	1

It is apparent, therefore, that the decision by a cable operator to drop a local broadcast signal and replace it with a less-watched cable program service has nothing to do with viewer preference, but instead only with the economic advantage which the cable operator believes it can derive from promoting the cable service and/or disadvantaging the system's broadcast competitor.

9. Difficulties which new basic cable network services may have in gaining carriage on cable systems are not necessarily attributable to a shortage of channel capacity, but instead to a lack of demand for new services which will further splinter the audience which watches basic cable programming, and thus make it more difficult for cable system operators to sell advertising on those services.

CableVision, in a March 9, 1992 article about Turner's efforts to sell the Cartoon Network to cable systems, quotes the Executive Vice President of the Cartoon Network as follows: "Local avails [of advertising time] is one of the top five factors in adding a channel. . . The top is whether the programming is differentiated and enhances the value of basic programming. If they get past that hurdle, then we get into the economics, in which ad sales and revenues are an important part." It is noteworthy that in the affidavit of Joseph M. Segel, it is admitted that the QVC Network was forced to pay cable systems a percentage of the network's sales and offer cable system owners an ownership interest in the network in order to obtain carriage.

10. Cable operators are also beginning to drop basic cable network services in some instances because the prices charged by program suppliers are too high. The March 9, 1992 issue of *CableVision* magazine reported on a dispute between four Sammons Communications systems and MTV Networks which occurred after the Sammons systems dropped the MTV service when MTV refused to permit Sammons to place the MTV on an optional "tier" which might not be taken by all of the systems' subscribers. Sammons did not want to include the increased cost of the MTV service in its basic service tier.

11. Other evidence that channel capacity is not the factor most limiting the growth of basic cable networks is the choice of several enlarged cable systems to "multiplex" existing channels, rather than add new services. Under this approach, one service, like Home Box Office, is offered on four or more channels at staggered times. The Time Warner system in Queens, New York, has chosen to use much of its expanded channel capacity for multiplexed existing services. Similarly, large cable systems like the one in Queens or the Fairfax, Virginia system use their channels to offer pay-per-view movies and other features on a staggered basis over several channels, instead of providing other cable program services. The September 1992 issue of *TV Technology* reports that cable systems in Baltimore County, Maryland, Queens, New York, and Littleton, Colorado, are participating in experiments in which ten pay-per-view movies are offered on up to 75 cable channels, with staggered starting times. In the Baltimore test, 25 channels will be dedicated to showing one movie with starting times every five minutes. Again, this shows that cable operators have capacity, but that capacity is not being used for new basic cable program services.

12. With respect to the Daniels complaint, NAB has reviewed the current channel listing for the Daniels system in Carlsbad, California. The Daniels system is currently carrying on a voluntary basis the signals of every local commercial television station that would be entitled to must carry status on the system under the 1992 Cable Act. On information and belief, the Daniels system is also carrying the signals of every non-commercial station which would be interested in and entitled to carriage under Section 5 of the Cable Act.

/s/ Charles E. Sherman
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[Notarization Omitted in Printing]

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Senior Vice President, Television, National Association of Broadcasters, Washington, D.C.

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President/General Manager, WHOI-TV, Peoria, Illinois

August, 1979 to August, 1984
President/General Manager, WTRF-TV, Wheeling, West Virginia

ACADEMIC EXPERIENCE

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Professor/Chairman, Department of Telecommunications, Indiana University

September, 1967 to August, 1975
Professor/Associate Chairman, Department of Communications Arts, University of Wisconsin-Madison

EDUCATION

June, 1967
Ph.D., Mass Communications, Wayne State University

January, 1963
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June, 1960
B.S., with Honors, Television & Radio, Temple University

BROADCAST ACTIVITIES

Member of:

ABC-TV Affiliates Association Board of Governors, served as secretary

National Association of Broadcasters, Research Committee, served as Chairman

Broadcast Education Association, served as Chairman

CBS Affiliates Board

NATPE Educational Foundation

Accrediting Council on Education in Journalism and Mass Communications

PUBLICATIONS

"The Asian Broadcasting Union." *Journal of Broadcasting*, Fall 1969.

" 'Initialization' in International Broadcasting." *Journal of Broadcasting*, Spring 1970.

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A book-length manuscript tentatively entitled *Broadcasting Through International Action.*

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The International Film Industry. In *Journalism Quarterly,* January, 1970.

PAPERS PRESENTED

"As Eurovision Approaches Its 25th Anniversary: An Apraisal," Speech Communication Association Convention, December 1975.

"Graduate Education in Radio-Television-Film," Broadcast Education Association, March 1974.

"Resources for International Broadcasting Research," Association for Professional Broadcasting Education, March 1973.

"Copyright Prospects," Association for Professional Broadcasting Education, Legal Seminar, October 1972.

"Interrelationships Between the International Broadcasting Unions," Speech Comunication Association, December 29, 1970.

"Intervision: Eastern Europe's Television Network," Association for Professional Broadcasting Education, International Broadcasting Seminar, November 4, 1970.

"Broadcasting in the Developing Nations of Malaysia and Indonesia," Wisconsin Speech Association, May 1, 1970.

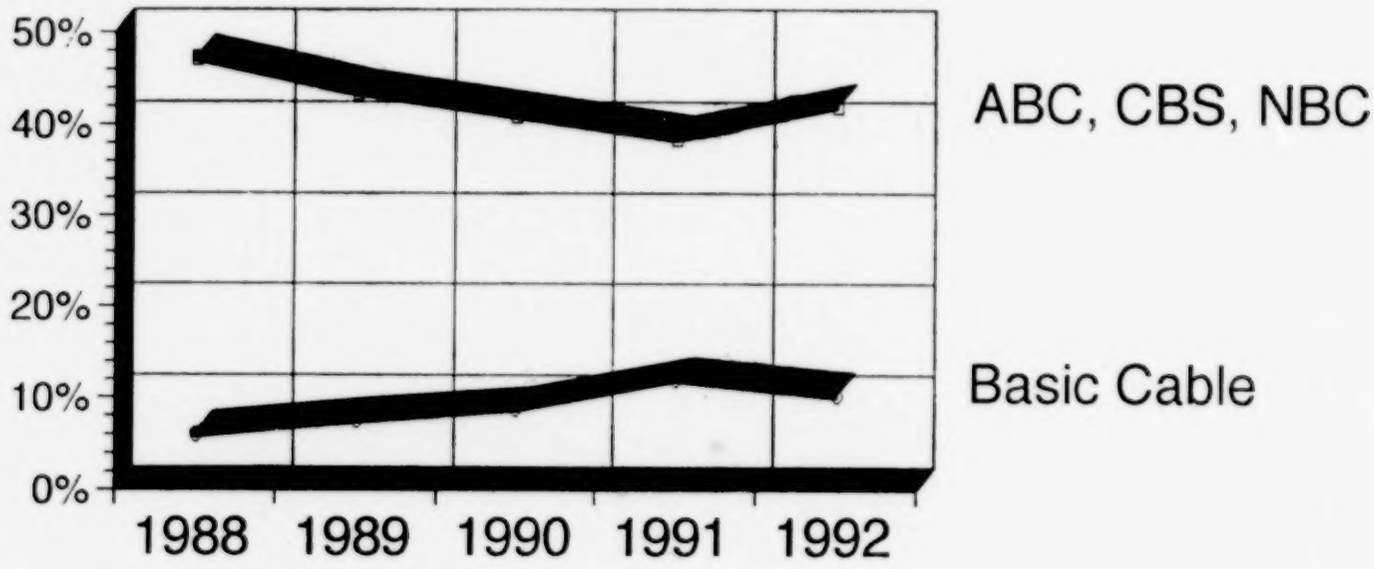
"Teaching the Basic Mass Media Course," Wisconsin Speech Association, May 2, 1969.

"The Areas of Needed Research in International Broadcasting," Speech Association of America, December 1967.

"The Activities of the European Broadcasting Union," Speech Association of America, December 1967.

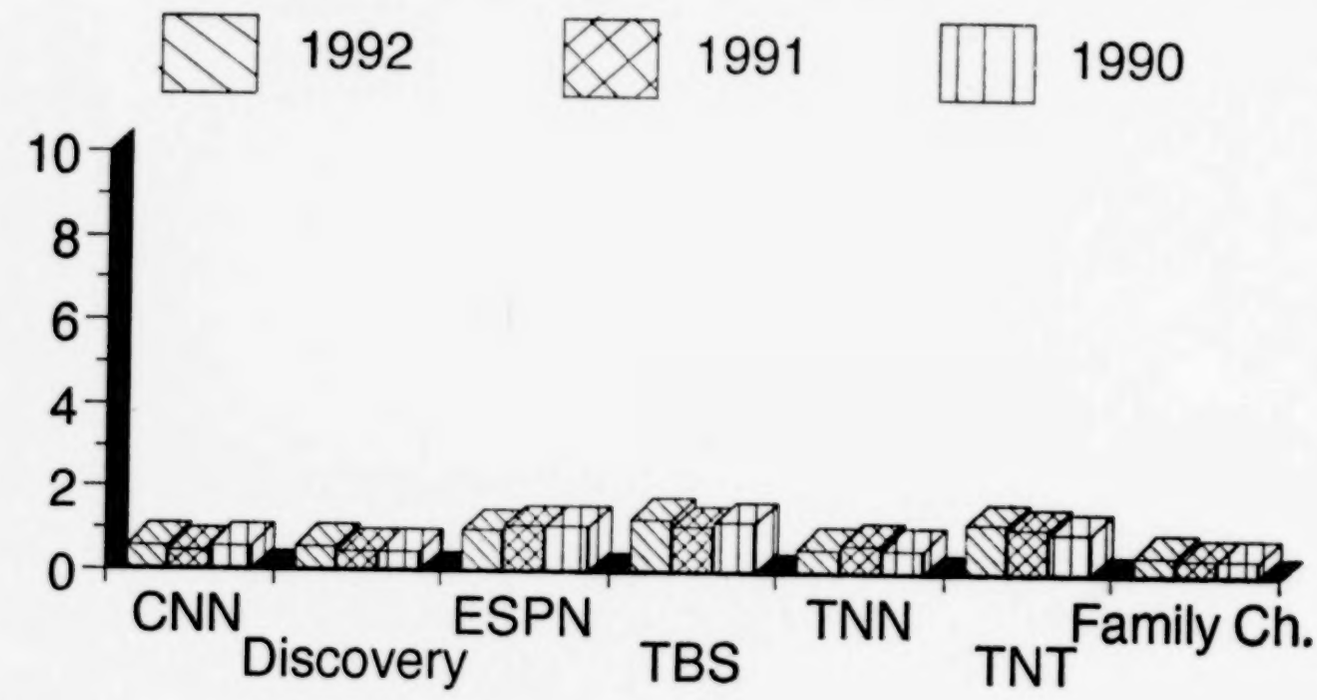
Prime – Time Ratings

Network vs. Cable

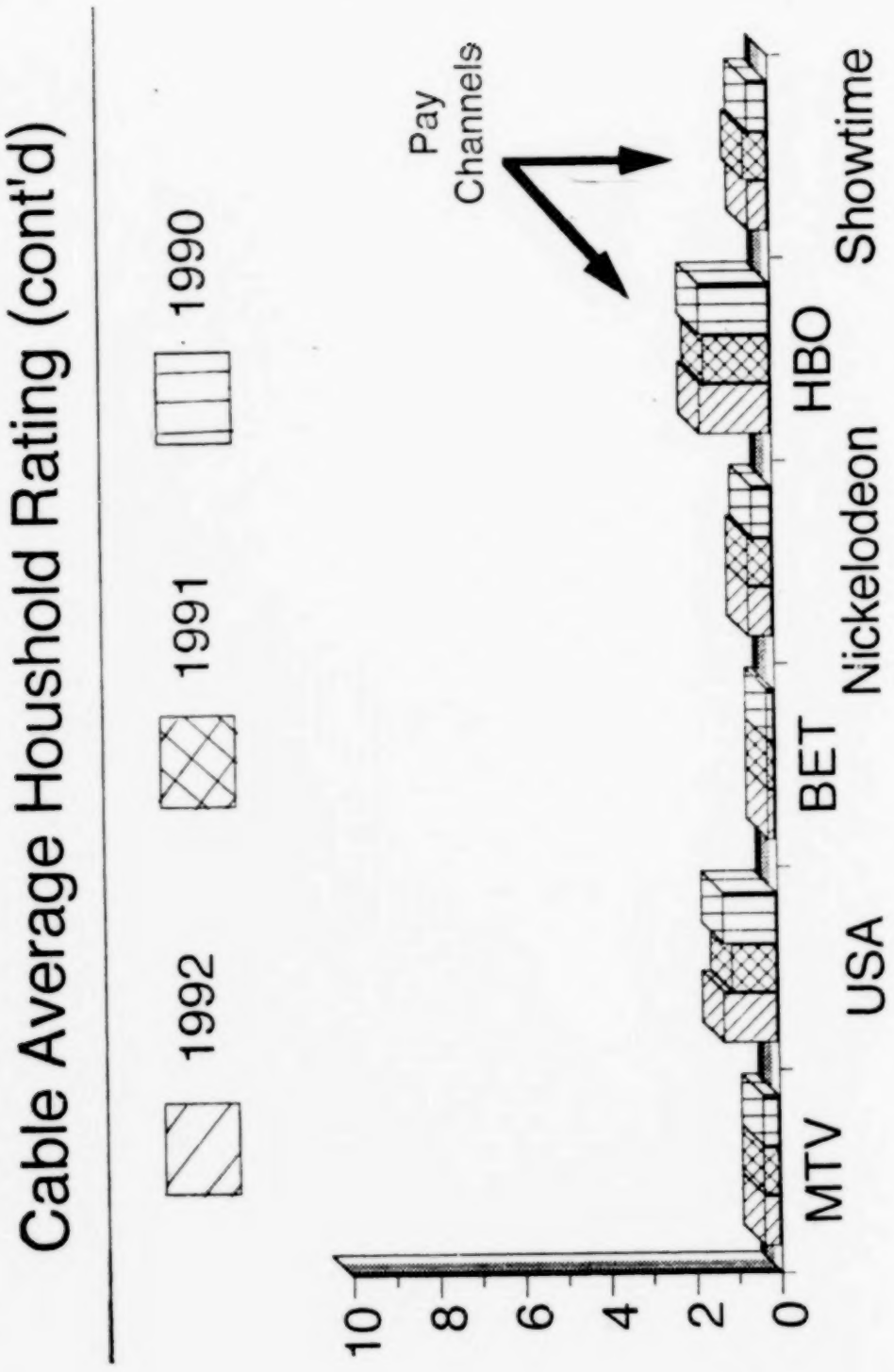


Source: A.C. Nielsen

Cable Average Household Rating



Source: Nielsen Market Research



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES A. FINCH

STATE OF KENTUCKY)
) ss:
COUNTY OF MASON)

James A. Finch, being duly sworn, deposes and says:

1. I am Vice President of Standard Tobacco Company, Inc. which owns and operates Limestone Cable Vision, Inc. (LCVI) located in Mason County, Kentucky. I am also President of LCVI, and as of November 30, 1992, this cable system had 4530 subscribers. LCVI has been in operation since 1958 with the same continuous ownership and currently has 33 active channels of it's 36 channel system. This system will probably never expand it's channel capacity above 36 channels.

The New Must Carry Requirements Will Affect LCVI's Channel Line-Up

2. The 1992 Cable Act, Section 615 establishes must-carry requirements for noncommercial educational television broadcast (NCE) stations. The manner the Act is currently written: Systems with 13 to 36 "usable activated channels" must carry up to 3 "qualified local" NCE signals as are requested that do not substantially duplicate (section 615(b)(3)(A)(i) and (C)).

3. LCVI is currently carrying one NCE, WKLE of Lexington, Kentucky. The only other NCE in this area

is WCET of Cincinnati, Ohio and all they have to do is demand that we add their channel to our system and we must comply with their demand. LCVI has "3" open channels, we do not desire to use the thirty sixth on the system, since it is the last usable channel and sometimes the picture on this channel has tendency to have a grany-type appearance. We are planning to add two channels in the near future: The Black Entertainment Network and The Trinity Network, since we have had many request from our subscribers for these two networks.

4. If the NCE channel of WCET were to be added to our cable vision system's channel line-up, only one of the two anticipated new channels could be added to our system. Therefore, Section 615 has quite a negative effect upon this cable system and community since only one of the two requested channels can be added to this system, BET or The Trinity Net—"a very difficult choice to make"!

Conclusion

5. Only "1" NCE signal should be required for Must Carry for cable systems of 36 channels or less, and these systems can have the option of adding 2 more NCE Signals if they so desire.

I declare the the foregoing is true and correct.

/s/ James A. Finch
JAMES A. FINCH

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID A. GARDNER

STATE OF PENNSYLVANIA)
) ss:
COUNTY OF CUMBERLAND)

David A. Gardner, being first duly sworn, deposes and says:

1. I am an employee of Raystay Co. and have been employed by it or its predecessor companies since 1962.

2. Raystay Co., a Pennsylvania Corporation organized in 1969, and its predecessor companies have operated cable television systems since 1951. It presently operates cable television systems in the communities serving Clinton County; Lycoming County; Cumberland County; Perry County; Franklin County, Pennylvania; Washington County; Frederick County, Maryland; Berkeley County, West Virginia; Marion County, Mississippi; Gila County; Apache County; and Coconino County, Arizona. Raystay Co. currently provides service to 50,200 basic cable subscribers.

3. TV Cable of Carlisle serves Cumberland County and Perry County in Pennsylvania. It has 14,800+ subscribers. It is in the Harrisburg, Pennsylvania television market. It carries a full compliment of Harrisburg network and public television stations. It is a 57 channel system and all channels are filled with program services.

Under the new must-carry rules as passed in 1992, the Carlisle system would be required to add WWPB, channel

31, Hagerstown, Maryland, a Maryland public television station from a smaller television market in Maryland. There has been no request by the viewing public for a Maryland public television service. If this service were required to be added, a cable program service such as C-SPAN II, The Learning Channel, or Black Entertainment Television would need to be dropped to provide channel space to add this service.

In addition to that, the system does not carry some Harrisburg market television stations that would be required under the new must-carry rules. Those specifically are: WLYH, channel 15, Lancaster, Pennsylvania; and WGCB, channel 49, Red Lion, Pennsylvania. Additional cable programming services would have to be dropped to make room for these broadcast stations.

4. TV Cable of Waynesboro serves Franklin County, Pennsylvania; Washington County, Maryland; and Frederick County, Maryland. It has over 8,800 subscribers. The system has a headend that serves the three communities, two of which are in the Washington D.C. ADI, and one of which is in the Hagerstown, Maryland ADI. The signals are processed at one location and go from the Washington ADI thru the Hagerstown ADI to a community in the Washington ADI. Therefore, the only way to serve must-carry signals in two markets would be to carry all signals from the headend on one cable since the Washington ADI signals' community that is served from the Hagerstown ADI community has so few subscribers as to not be cost efficient to provide a separate headend. The system has 42 cable channels and currently carries a full compliment of network and PBS signals. However, under the new must-carry rules, the cable system would have to add the following broadcast signals: WHMM, WFTY, WTKK, all Washington D.C.; a Maryland public television station from Frederick, Maryland, however its transmitter is almost in Washington,

D.C.; and WNVC, WNVT public television stations in Virgina.

To provide additional channel space for these new broadcast services, cable program services such as C-SPAN, Discovery, etc. would have to be dropped.

5. TV Cable of Inwood serves Berkeley County, West Virgina with approximately 3,500 basic subscribers. It carries a full compliment of network stations and a West Virgina public television broadcast station.

Under the new must-carry rules, it would be required to add a Maryland public television station from the Hagerstown, Maryland smaller television market; and WNVC, WNVT, WFPT, all public television stations. Since the system is 35 channels and completely full, it would be required to drop a cable program station such as C-SPAN or the Learning Channel.

6. TV Cable of Central PA, the Avis system serves 6,800 subscribers in Lycoming and Clinton County, Pennsylvania. It has been in operation since 1955. It has carried a full compliment of network and public television signals, and the CBS station that it carries has been significantly viewed since before 1972. The cable system is completely full and has no available channels; therefore, any new channels added would require the dropping of an additional channel. Under the new must-carry rules, this system would be required to carry WYOU from Scranton, Pennsylvania. This would require the dropping of either the current CBS affiliate that is significantly viewed (and has been since before 1972), or a cable program service such as C-SPAN or The Learning Channel. The Lycoming County area presently has a television station licensed to it but not on the air. Therefore, the situation in this system is confused as to which television market Lycoming County is in and which television market Clinton County is in. There is one headend that serves both areas and the signals cannot be broken down.

7. In the Raystay Co. systems, the new must-carry rules will displace cable program services that provide diversity of choice to the subscribers with broadcasters stations that have not been provided in the past due to lack of interest by the subscribing public. This will lead to a reduction in the diversity of programming available to the public.

This third day of December, 1992.

s/ David A. Gardner
DAVID A. GARDNER

Date Dec. 3, 1992

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID L. HANSON

STATE OF WISCONSIN)
) ss:
COUNTY OF EAU CLAIRE)

David L. Hanson, being first duly sworn, deposes and says:

1. I am Vice President of Operations of the General Partner of Marcus Cable Partners, L.P., a limited partnership operating cable television systems in Wisconsin. I first joined the Marcus Organization in 1982 and was appointed to my present position in 1990. I submit this Affidavit in support of plaintiff's Motion for a Preliminary Injunction.

2. Marcus Cable Partners, L.P. operates 53 small cable systems in Wisconsin.

3. The cable system serving Hayward, Wisconsin was built in 1972 with a channel capacity of 20 channels. Marcus Communications purchased the system in 1988 and upgraded the equipment to allow for channel capacity of 35. There is currently one available channel (35) not in use. The system served 846 customers in 1988 and currently serves 1235.

4. Marcus Cable initiated a Broadcast Only level of service in June of 1992. This level of service includes 11 broadcast signals from: Duluth, MN; Minneapolis, MN; Eau Claire, WI; Park Falls, WI; Chicago, IL; and Atlanta, GA, consisting of two CBS affiliates, two ABC affiliates, two NBC affiliates, one PBS affiliate, one FOX

affiliate and three independent stations. Security for these services is by negative traps to ensure compatibility with cable compatible VCR's and televisions. The channel line-up for this level of service was determined by reviewing customer requests and response. Local officials were consulted in the decision making process.

5. Marcus Cable has not programmed channel 35 to allow for the addition of a service that would offer diversified programming that would benefit and/or be requested by the cable customers of the community. Such programming now available or being discussed includes: Court Television, The Cartoon Network, pay-per-view, Milwaukee Brewer Baseball, etc. . . or other such programming that would not be normally duplicated on the system's line-up that Marcus Cable, in the exercise of its programming discretion, may choose to provide.

6. On November 24, 1992, Marcus Cable received a letter from WDSE-TV demanding carriage of the broadcast channel on channel 8 of the Hayward cable system beginning December 4, 1992. Marcus Cable does not wish to carry this signal. The rights of Marcus Cable to determine the content of it's offering would be affected and limited by this action, with no benefit to any party other than WDSE-TV.

CONSEQUENCES

Implementing this demand may force Marcus Cable to:

1. Rearrange its present line-up. WDSE-TV has requested carriage on channel 8 on the system. This channel is currently programmed by WLEF-TV, the Wisconsin PBS provider from Park Falls, Wisconsin.

2. Delete a broadcast signal currently carried by the system in response to significant consumer requests that Marcus Cable wishes to continue to carry.

3. Use channel 35 for a broadcast signal. This action would cause significant expense to the system to remove

the traps currently used for security while placing a new security method in place, in addition, use of channel 35 would also not allow Marcus Cable to take action in the future to meet the requests for non broadcast programming.

/s/ David L. Hanson
DAVID L. HANSON
V.P. Operations of the
General Partner

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JONATHAN B. MARX

I, Jonathan B. Marx, declare as follows:

1. I am Vice President and General Manager of Viacom Cable and, in this capacity, am responsible for the operations of Viacom's San Francisco cable system. This system has 54 usable channels with no available channel capacity at this time.

2. Viacom San Francisco has received two written requests from noncommercial broadcast stations seeking carriage on our system pursuant to Section 5 of the new Cable Act. The first is from KRCB-TV in Rohnert Park, California; the second is from Station KCSM in San Mateo. Copies of these letters are attached hereto. Both requests demand carriage under the Act commencing December 4, 1992.

3. Because of the lack of any available channel capacity, the must carry requirements have created a very difficult situation for us. To comply with the requests for carriage, we will be forced to drop two cable program networks from our offerings. We have not yet determined which networks we will stop carrying.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of December, 1992.

[s] Jonathan B. Marx
JONATHAN B. MARX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JOSEPH A. WYANT

1. I am General Manager of Storer Communications of Northern Kentucky, Inc. ("Storer"), a cable television system serving 56,000 customers in Kenton, Boone, and Campbell Counties and the City of Newport, KY. I have held this position since July of 1991. My experience in cable television dates back to May of 1981 when I was named Director of Programming for Viacom Cablevision of Cleveland (OH), Inc. In 1984, I was named Director of Marketing of Viacom Cablevision of Dayton (OH), Inc. In 1989, I was named General Manager of TKR Cable Co. of Warwick (NY), Inc., where I served until coming to Northern Kentucky. I submit this Affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

Factual Background

2. Storer operates a dual cable system in Northern Kentucky with 64 channels devoted to subscriber service.

3. Additionally, some parts of the system, including the City of Newport, rural Campbell County, and yet-to-be-built sections of rural Kenton County are single-cable, with a capacity of 54 channels.

4. Storer presently carries two public television stations, WCET (Cincinnati) and WCVN (Covington). In addition, the system offers Kentucky Educational Television's ("KET") STAR Network, specialized in-school classroom and teacher education programming on an educational access channel.

5. The system now has two open channels available for new programming channel B3 and channel B12.

6. Prior to passage of the new cable law, Storer had conducted consumer research into new programming desired by its customers. As a result of that research, "Comedy Central", a cable network devoted to comedy-oriented programming, was chosen for launch over "Sci-Fi", a brand new service featuring science fiction programming. "Sci-Fi", however, could have occupied the second of the two available channels, eventually. Upon realizing that passage of the new cable law was imminent, the system and corporate staff decided to cancel these plans because of the uncertainties presented by the new law.

7. Subsequent to the decision to cancel the launch of "Comedy Central", the system received notice from Greater Dayton Public Television on November 30, 1992, demanding carriage of its two non-commercial affiliates WPTO (Oxford, OH, ch. 14) and WPTD (Dayton, OH, ch. 16). A copy of that notice is attached. Greater Dayton Public Television further claimed its right under the new law to have carriage on-channel, thereby creating a need for Storer to change its existing line-up by removing the existing programming from those two channels, replacing it with the new, non-commercial must-carry stations.

8. The two channels affected are, respectively, Boone County government access and WSTR (off-air, ch. 64), a Cincinnati independent commercial broadcaster.

Impact on Storer

9. The requirement to carry the two Greater Dayton Public Television affiliates consumes all remaining free space for new programming on the system, preventing Storer from adding any of the new basic cable programming services, e.g., Comedy Central, Sci-Fi, or Bravo.

10. Relocation of the Boone County Government Access channel from channel 14 will cause the system significant hardship in its relations with the Kenton Boone CATV Board which oversees most of the franchise territory. That entity has been an extremely active programmer over the years, operates the adjacent channel (15) as the Kenton County Government access channel, and has maintained a strained relationship with Storer, historically.

11. Channel 14 also serves as government access for Campbell County and the City of Newport. Relocation for those communities will entail expenditures to revise current delivery methods for access into their areas, disrupting their programming activity and leading to animosity toward Storer.

12. Storer will be in a position of having to carry four similar public television stations, limiting viewer options rather than expanding them as would be possible with the addition of cable services noted above.

Conclusion

13. Addition of the two stations operated by Greater Dayton Public Television will not serve the best interests of the cable television subscribers in Storer's Northern Kentucky system. Instead of broadening their viewing choices, carriage of those two stations will eliminate Storer's ability to offer other, truly differentiated programming.

14. Furthermore, Storer's relations with area franchising authorities, upon whom the cable operator is dependent for renewal in 36 months, will be strained by the demand to relocate their existing government access channels.

15. Finally, channel realignments are always disruptive to customers, no matter how carefully planned and promoted. The arbitrary and illogical addition of the two Greater Dayton Public Television stations will be per-

ceived as a bad decision on Storer's part, rather than as the mandated action it is, in fact.

I affirm that the foregoing is true and correct.

This 3rd day of December, 1992.

/s/ Joseph A. Wyant
JOSEPH A. WYANT

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DECLARATION OF WILLIAM GOODWYN

I, William Goodwyn, declare as follows based on my own personal knowledge:

1. I am Vice President of Discovery Communications Inc., with responsibility for The Learning Channel a programming service owned by Discovery Communications.

2. I submit this affidavit in support of plaintiff's motion for summary judgment. While the basic facts supporting the motion are undisputed, this affidavit is submitted to show the injury to plaintiffs and the need for immediate review. *See, Abbott Laboratories v. Gardner,* 387 U.S. 136, 152 (1967).

3. I am in charge of affiliate sales and relations. My responsibilities include marketing, promotion, and distribution of The Learning Channel to cable operators. Accordingly, I am in frequent contact with cable system operators.

4. Discovery Communications, Inc. acquired The Learning Channel in early 1991 as a complimentary service to the Discovery Channel for $31.5 million. Discovery Communications improved The Learning Channel's programming and relaunched it in October, 1991. To date, Discovery Communications has invested an additional $43 million revamping and upgrading The Learning Channel. Discovery Communications plans to spend an additional $150 million on The Learning Channel over the next few years.

5. The Learning Channel currently provides 18 hours of programming every day of the week. It is carried on approximately 15% of cable systems in the United States.

6. The Learning Channel is the only cable network that offers people of all ages enjoyable, entertaining ways to learn and to satisfy their natural curiosity. The Learning Channel features entertaining educational programming for people of all ages. The Learning Channel's programming includes:

a. *Preschool educational programming.* The Learning Channel is offering breakthrough programming to prepare preschoolers for school. As of December 28, 1992, The Learning Channel introduced a six-hour block of commercial-free preschool educational programming on weekday mornings, known as "Ready, Set, Learn." Its objective is to enhance readiness for school. Rooted in proven learning methods and designed to hold youngsters' attention, the "Ready, Set, Learn" programs aim to develop preschoolers' skills across the learning spectrum. Children are exposed to developmental learning areas such as reasoning, whole language learning, social interaction, basic reading, conceptualization and imagination. "Ready, Set, Learn" is recommended for viewing by the National Education Association ("NEA"). It follows the seven steps expressed in the education mandates from the Carnegie Foundation For The Advancement of Teaching. According to John Hendricks, Chairman of Discovery Communications, Inc. "It is up to all of us in the television industry to contribute to the enrichment and preparedness of preschool children. We saw a glimpse of that promise and vision in the early years of television, but that vision fell victim to commercially-driven programming that primarily targets adults, not children." For more details of "Ready-Set, Learn" see Exhibit A hereto.

b. *Elementary school programming.* The Learning Channel programming aimed at elementary school students includes "Beakman's World", "Ask Cassie or

Laurie" and "Mad Math," which teaches fractions, decimals, and ratios in an entertaining manner. Starting in January, The Learning Channel will carry a weekly hour-long, commercial-free program, "The Learning Channel Elementary School." This series will provide teachers with copyright-cleared programming which teachers can tape and use in their classrooms for up to 2 years to supplement curriculum materials. It will be the only such series available to elementary school teachers. For more details about The Learning Channel's programming for elementary school students, see Exhibit B hereto.

c. *High School programming.* Weekly programs such as "A Practical Guide to the Universe" and "Ten Great Writers" are offered for high-school age and others. The Learning Channel also offers a service called "So You Want to Be In [name of profession]" which introduces young people to different career opportunities in many industries. For more details, see Exhibit C hereto.

d. *Adult education programming.* The Learning Channel's "No Problem" is a weekly series designed to teach English to Spanish-speaking people. To help illiterate adults learn to read, The Learning Channel presents a weekly series entitled "Learn to Read." Also in September, on International Literacy Day, The Learning Channel premiered a special one-hour program "To Read" in partnership with the Newspaper Association of America. The Learning Channel also offers other practical programming that makes people more competent in their daily life. See Exhibit D for more details about this programming.

e. *Teacher training programming.* The Learning Channel's "Teacher TV" is produced by, for, and about teachers. It appears weekly and concerns such topics as school reform, teacher innovation, profiles of outstanding educators and teacher training. It is recommended for viewing by the NEA. See Exhibit E hereto for more details on programming for teachers.

7. Although a service called "The Learning Channel" has been in existence since the early 1980's, The Learning Channel is regarded as a start-up channel because of the substantial changes Discovery Communications made to it after acquiring it in 1991. As a start-up channel, it is struggling to obtain channel space. Cable system operators generally have between 36 and 54 channel spaces available for programming. The Learning Channel usually vies for one of the last available channel spaces.

8. Prior to the passage of the Cable Act of 1992, The Learning Channel's efforts to expand its carriage were succeeding. The Learning Channel was adding 400,000 new subscribers per month by late summer 1992. After the Cable Act became law, The Learning Channel growth slowed substantially. The Learning Channel now projects it will add fewer than 75,000 subscribers per month on average, and The Learning Channel may even experience a loss of subscribers as cable operators replace it with must-carry programming mandated by the Act. The Learning Channel currently has about 17.5 million subscribers.

9. The Act's requirement that cable operators must carry local over-the-air broadcast stations has harmed The Learning Channel. Cable operators who had been considering adding The Learning Channel have not done so because of the need to preserve channel space for mandated local over-the-air broadcasting stations. Among the cable operators who have refused to add The Learning Channel because of the Act's requirements are Continental Cablevision in Stockton, California, Continental Cablevision in Marysville, California, and Bresnan Cable in Essexville, Michigan.

10. The must-carry provisions of the Act also will cause The Learning Channel to be dropped by some cable operators to make room for additional local over-the-air broadcast stations. For example, TKR in Piscataway, New Jersey has informed The Learning Channel that it

may have to drop three cable networks, which may include The Learning Channel in order to add three local independent broadcasters are required by the Act.

11. The Act's rate-regulation provisions are harming The Learning Channel. The Act specifies the minimum content of a basic rate-regulated tier of programs, which will have the widest audience. Cable programs, including The Learning Channel, are not specified for inclusion, and no cable operator has offered to put The Learning Channel in the minimum tier. Rather than being considered for the basic tier, The Learning Channel is now being considered in most cases only for inclusion in a new experimental tier which will have a very limited audience. Among the cable systems who were considering adding The Learning Channel to basic service, but who have added it as part of an experimental new tier, are Scripps Howard of Chattanooga, Tennessee, and Scripps Howard of Knoxville, Tennessee. The Learning Channel has reduced its long-term subscriber projections by more than 25% because of the impact of the movement of The Learning Channel to higher tiers as a result of the Cable Act of 1992.

12. The increased financial pressure caused by rate regulation also has injured The Learning Channel. Thus, some cable system operators have expressed greater reluctance to carry programming such as The Learning Channel which have fewer revenue generating opportunities. For example, a cable system in Corona, California is no longer considering adding The Learning Channel, but will fill its remaining channel space with pay-per-view channels and must-carry requirements.

13. The Act's "channel positioning" provision reserves for over-the-air broadcast stations the cable channel which corresponds with its over-the-air broadcast channel. Thus, over-the-air broadcasters will obtain a disproportionate number of low number channels and cable programmers will have a disproportionate number of high-number chan-

nels. As a general rule, low-number channels are likely to have larger audiences than high-number channel numbers. When viewers "graze" or "browse" through channels, they generally start at the low channel numbers.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on February 10, 1993.

/s/ William F. Goodwyn
WILLIAM GOODWYN

ALL ABOUT
READY,
SET, LEARN!

[Picture Omitted]

READY, SET, LEARN!

- Opportunity: Educators and legislators are recommending quality television as part of a campaign to help send children to school ready to learn. But to hold a preschooler's attention, these programs must also be involving and fun. To put parents at ease and create an uncluttered learning environment, such programs should also be free of commercials. Something parents can feel good about letting their preschoolers watch and learn from.
- Solution: As an affiliate of The Learning Channel, you will air Ready, Set, Learn! A 30-hour-a-week morning block on The Learning Channel created to get preschoolers ready to learn. This unique, commercial-free programming airs every weekday morning, 6AM to Noon, ET.
- Hosted by popular children's singer composer Rory
- Makes learning fun with delightful, insightful series like:

  —Magic Box—teaching reading fundamentals

  —Join In!—encouraging social interaction

  —Bookmice—sharing the joys of reading

  —Zoobilee Zoo—develops creativity

  —Kitty Cats—solving problems and developing interpersonal skills

  —Iris the Happy Professor—teaching children that learning is fun

- Recommended for viewing by the National Education Association
- Commercial-free environment puts parents at ease
- Inspired by the Carnegie Foundation's objective to better utilize "television as a teacher"

- Benefits:
  - Watching cable helps preschoolers prepare for school in an intellectually stimulating and totally enjoyable forum
  - Parents can feel good about having their children spend quality time interacting with TV
  - The entire nation gains from having a better prepared generation of children "ready to learn" when they enter school

- Local Benefits:
  - You'll be a hero in your community and demonstrate to community leaders and legislators that cable really cares
  - You'll be promoting cable programming that appeals to non-subscribers

Find out how you can offer Ready, Set, Learn! programming to an audience that's truly cable-ready.
Call your local TLC representative today.
Eastern/Central: (301) 986-1999
Western: (310) 551-1611

[TLC Logo]

The Learning Channel
7700 Wisconsin Avenue
Bethesda, Maryland 20814-3522
(301) 986-1999

READY, SET, LEARN!

In January of 1993 The Learning Channel will introduce an exciting new block of programming especially designed for pre-school children. The block titled *Ready, Set, Learn!* will provide parents and tots with a forum to learn relevant developmental skills such as reasoning, whole language skills, social interaction with others, basic reading, and conceptualizing imagination skills. The block will air Monday through Friday mornings.

The Magic Box

This entertaining half-hour program teaches pre-school children to read. Key learning concepts are presented in an entertainment style with songs, alphabet games and individual stories and books. US Premiere.

Bookmice

Take three curious puppet mice who love to read, make them secret residents behind the walls of the neighborhood library and watch a lively, new television series unfold. Designed for children to discover the thrill of books and libraries, *Bookmice* combines wonderful puppetry and people, live action and animation, songs and storytelling. US Premiere.

Zoobilee Zoo

This Emmy nominated series stars Emmy and Tony award-winner Ben Vereen leading an ensemble cast of singers, dancers and actors through adventures in discovery, creativity and fun. Vereen portrays "Mayor Ben" a wise and magical leopard who resides on a mountain top overlooking Zoobilee Zoo. The other residents of this special place are talented animal characters called Zoobles, each of whom represents a special skill in the creative arts.

Zoobilee Zoo received a coveted Achievement in Children's Television award from Action for Children's Television. It is also recommended by the National Education Association, and endorsed by The American Federation of Teachers, The National Association of Elementary School Principals and The American Association of School Administrators. Cable Premiere.

DESIGNED FOR YOUNG LEARNERS

MAD MATH

An Original TLC Series

As part of TLC's educational initiative, we present *Mad Math,* an accessible, fun-filled weekly sitcom that explains math fundamentals to viewers ages 9-14. Students will replace fear of challenging math concepts, such as decimals, fractions, and percents, with confidence and knowledge as they participate in this engaging, enjoyable, trust-building adventure. Saturdays from 9:00-9:30amET.

BENEFITS

- Parents will be delighted to see a series that helps them by helping their children conquer their fear of math.
- Students gain an entertaining yet useful television option, and an alternative to standard Saturday morning fare

SO YOU WANT TO BE IN . . .

An Original TLC Production

If you love baseball, lots of jobs can get you into the ballpark. *So You Want To Be In . . .* introduces young people—and grown-ups, too—to real career opportunities in glamour industries like baseball, rock and roll, and movies. An original TLC series of specials, *So You Want To Be In . . .* features profiles of intriguing people who combined life-long passions with job skills to pursue careers both in and "next to" the limelight. Watch for upcoming episodes.

BENEFITS

- Excellent promotion opportunities through local tie-ins with schools

- Young people will be inspired—and parents will be pleased—to hear how they can use their studies to fulfill their career dreams

A WORLD OF IDEAS

MAD MATH

He's wild! He's crazy! He's animated! And boy, does he know math! Mad Math explains math fundamentals to viewers ages 9-14 in an accessible, fun-filled weekly sitcom that's part of The Learning Channel's educational initiative.

[Picture Omitted]

Air Dates

Premiering on May 9, Mad Math will air Saturdays from 9:00-9:30 AM (ET). The series will feature 13 original half-hour programs.

Mad Math's Promise

This series uses the entertainment power of television to help children, with their parents, learn the fundamentals of math. Students will replace fear of math with confidence and knowledge as they learn how to permanently vanquish *Bad Math* from their minds. Mad Math will capture students' attention and make learning math what it should be . . . an engaging, enjoyable, trust-building adventure.

Format

This learn-at-home program offers an engaging, information-packed format that uses both live and animated characters.

Mad Math revolves around two young Hispanic-American actors who portray a brother and sister. The younger brother is a computer and math whiz who tutors a school jock. Each episode will find the trio in a new situation which leads to a mathematics lesson on *fractions, decimals & percents,* or *ratios & word problems* via videotape.

The animated character Mad Math and his nemesis *Bad Math* lead the video graphic portion of the program.

[Picture Omitted]

THE LEARNING CHANNEL, Cable's premiere educational network, is dedicated to entertainment that educates and inspires 18 hours a day. TLC is a part of Discovery Communications, Inc., which also owns and operates The Discovery Channel.

[TLC Logo]

DISCOVERY COMMUNICATIONS, INC.
7700 Wisconsin Avenue
Bethesda, Maryland 20814-3522
301-986-1999

Affiliate Sales Offices:

Northeastern Region & Corporate	301.986.1999 ext 5457
Southeastern Region	404.435.3599
North Central Region	312.946.0909 ext 428
Pacific Region	310.551.1611 ext 5912

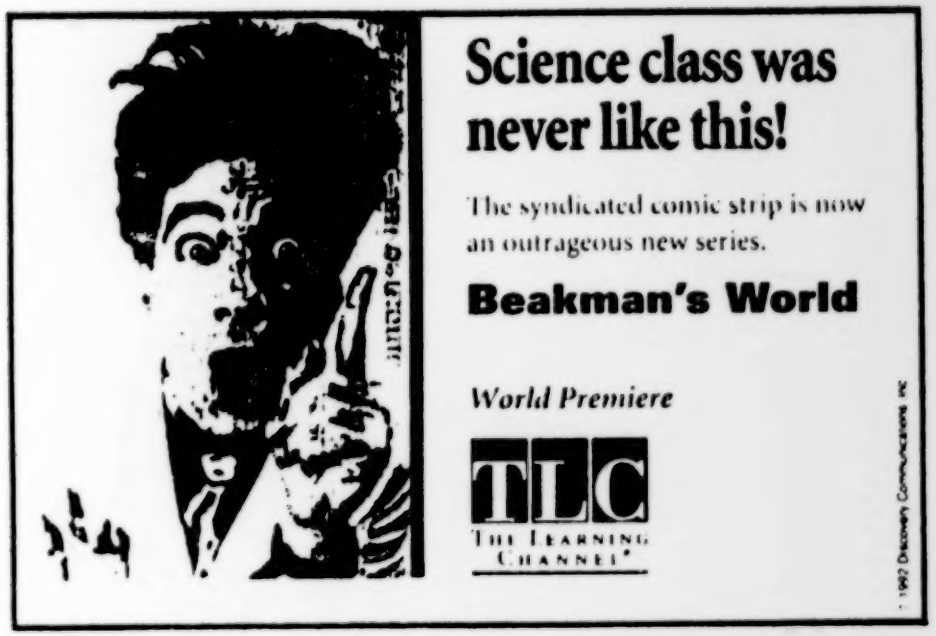
Science class was never like this!

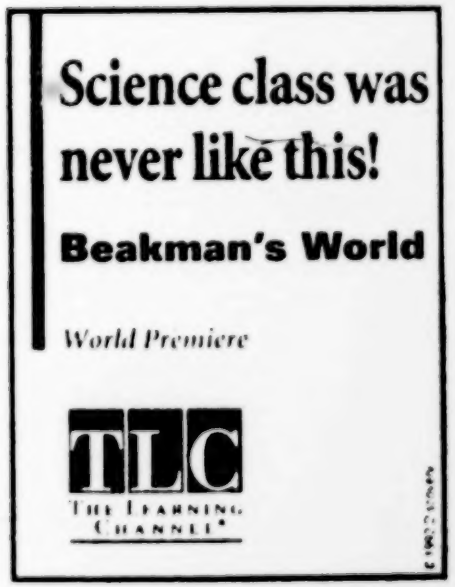
The syndicated comic strip is now an outrageous new series.

Beakman's World

World Premiere

TLC
THE LEARNING CHANNEL





Beakman's World
Wednesdays, Beginning Sept. 30

8pm ET
7pm CT

9pm MT
8pm PT

WEEKLY SIGNATURE SERIES

[Title Illegible]

THE NEW LEARNING CHANNEL

We've transformed The Learning Channel
into groundbreaking, trend-setting television
that awakens the amazing power of the mind
and encourages thought in viewers of all ages.

It enlightens, delights, and stretches the imagination.
It makes an enriching and positive difference.

It's stimulating, provocative, and fun-to-watch.
It's the ongoing result of millions of dollars
and commitment to excellence you'll recognize
from the creative talents of the people at Discovery.

Television has the power to educate,
entertain and inspire.
The Learning Channel makes this a reality
18 hours a day.

[TLC Logo]

[Picture Omitted]

100 Great Books

What books changed the course of human history? Curl up with The Learning Channel and explore the artistic and social impact of humanity's literary masterworks, from the *Koran* to *The Origin of the Species* and *Walden Pond*.

A Practical Guide To The Universe

In practical terms we can all understand. The Learning Channel explains such celestial wonders as stars, planets, asteroids, the Big Bang, quarks, and other mysteries of the cosmos.

Science Frontiers

[Picture Omitted]

Today's theories are tomorrow's realities. Take an in-depth look at 21st Century science and its far ranging impact on life as we know it. From Bio-engineering to the origins of the universe *Science Frontiers* patrols the cutting edge of scientific thought.

TLC's What to Know

Who was Nietzsche and what did he have to say? And when we say "Freudian slip," are we really sure what we mean? What's the difference between Bach and Beethoven and, for that matter, is Modigliani a pasta dish or an artist? This series irreverently takes us through the icons

[Picture Omitted]

of science, the arts and the humanities, turning the vague into the familiar by supplying bite-size chunks of information and insight. It's expressly tailored for the impatient knowledge-seekers of the 90's.

[Picture Omitted]

10 Great Writers

Dramatization and documentary profiles of ten of the world's leading authors and their works, from James Joyce to Virginia Woolf.

[Picture Omitted]

The Human Condition

This series of fast-paced hours features themed episodes that cast a fresh light on human health and behavior in our families, workplaces, and key relationships. Whether it's "problem" children, stress, or sexual harassment, *The Human Condition* tells engrossing human stories that offer insight and authoritative solutions for common problems.

[Picture Omitted]

The Naked Eye

British author Desmond Morris and the BBC cameras focus on the most intriguing animals of all—humans—in this enthralling look at our behavior. Human work, play, families, sex, creativity and language will be analyzed from the perspective of one of the world's premier observers of the species, whose path breaking book, *The Naked Ape*, took the world by storm in the mid-1960's.

[Picture Omitted]

Archaeology

New this fall. The Learning Channel teams up with *Archaeology* magazine and the American Institute of Archaeology to take you on the dig of a lifetime. Host John Rhys Davies, of *Raiders Of The Lost Ark* fame, explores archaeology in today's world and shows how modern, high-tech equipment is being used to unearth clues to past civilizations . . . how the people lived, what they achieved, and what we can learn from their mistakes and triumphs.

[Picture Omitted]

A Traveler's Journal

Venture into unfamiliar places within familiar countries. The Learning Channel's special guides reveal their native and adopted homelands as only those who live there are able to. Join guest guides like Diana Rigg on an insider's tour of her native Scotland, and Gore Vidal on a lively escapade through the palaces and pleasure houses of Venice.

[Picture Omitted]

People of the 20th Century

They influence what we wear, what we think, and how we view our world. Meet the intriguing personalities of our century as The Learning Channel introduces viewers

to "The Kennedy Women," "Famous Couples," "False Messiahs," and others.

Charlie Rose

Emmy award-winning journalist and former CBS *Nightwatch* anchor Charlie Rose offers a thought-provoking alternative to mind numbing talk shows.

[Picture Omitted]

J.P. Donleavy's Ireland

Don your kilt, heft your bagpipes and join renowned author J.P. Donleavy as The Learning Channel presents a world premiere special showcase of the people, culture, and creativity of the Emerald Isle. Experience the magic of all things Irish through profiles of James Joyce, Irish cuisine, Irish history, and the lush Irish countryside.

Designed For Community Outreach

TO READ

On Original Special Produced in Conjunction With The Newspaper Association Of America

To Read celebrates the transformational power of reading. Join a cast of celebrities in the fields of sports, entertainment, art, and literature as they share their personal, inspirational, often humorous experiences with reading. *To Read* covers the gift of reading—and reveals the value of this unique human ability. Premiering on *International Literacy Day,* Tuesday, September 8 at 8:00pm ET, with repeat airings throughout the week.

Benefits

- Positions your system as a leader in promoting reading and adult literacy in your community
- Exceptional promotional opportunity through participation in TLC's literacy promotion campaign in conjunction with *To Read*

LEARN TO READ

Learn To Read eases those adults who can't read into a gradual understanding of the English language, introducing viewers to letters, vowel sounds and complete words. During the series, viewers gradually build a knowledge of written forms. Sundays at 9:30am ET.

Benefits

- Gives adults the opportunity to learn to read in the safety and privacy of their homes
- Enhances your community image

NO PROBLEM!

TLC presents an English language initiative for Spanish-speaking viewers. It offers practical lessons which come out of real-life situations like job hunting, house hunting, opening a checking account, and more. Sundays at 9:00am ET.

BENEFITS

- Provides a valuable service to the Spanish-speaking community
- Opportunity to use Spanish language cross channel spot for promotion

[TLC LOGO]

Announcing A Major Literacy Effort By
The Learning Channel, The American Newspaper
Publishers Association And You.

Newspapers and magazines bring us the world. Books offer inspiration and insight. Signs and messages tell us where we're going and warn us of dangers. No other human skill is as important as reading. From the first symbols in clay more than 6,000 years ago through the explosion created by the printing press, reading has changed and molded our history and culture.

Original Special Kicks Off Campaign

To Read: 1 hour-long special. A celebration of what it means to be able to read. The Learning Channel, in conjunction with the American Newspaper Publishers Association, presents an original production on the beauty, importance and personal experience of reading. But more than just facts and interviews, this compelling one-hour documentary brings viewers personal, sometimes humorous experiences with reading by celebrities in the fields of sports, entertainment, art and literature—and reminds us of the value inherent in this glorious gift.

On-Going Literacy Programming

Learn To Read: 29 half-hour episodes which allow adults who can't read the opportunity to learn in the privacy of their own homes.

No Problem: 13 half-hour episodes which highlight everyday transactions in English, giving Spanish-speaking immigrants and Americans useful, practical skills in day-to-day personal and business situations.

Take Credit As A Partner In The TLC/ANPA
Literacy Project:

In mid-July the ANPA Foundation will be sending literacy supplements to their member newspapers to be included

in the September 8 issue of the local paper. Last year, more than 300 newspapers nationwide published this supplement. This year, TLC offers you, our affiliate, the opportunity to customize, as a sponsor, this insert (also called To Read). Highlight your schedule, promote your commitment to community issues, and promote literacy.

[TLC Logo]

Designed For Your Educator Audience

TEACHER TV

An Original Series Co-Produced By TLC and The NEA

Teacher TV is an energetic, visionary program by, for, and about teachers shot on location in schools throughout the country. Created with the input of thousands of educators, *Teacher TV* provides teachers with a means to share techniques, ideas, and resources. The half-hour program profiles teachers, schools, and communities that dare to challenge the educational status quo. Sundays from 6:00-6:30pm ET.

Benefits

- Built-in audience of more than 2 million NEA members
- Local tie-in opportunities with location shoots
- Destined to become required viewing for all Americans interested in what is happening in education today
- Reflects cable's commitment to education and the community

Critical Acclaim

- "Cum laude to The Learning Channel's *Teacher TV*."
  —*TV Guide*
- "TLC gives weary teachers a voice . . . The series is something that's desperately needed . . . a show we can all learn from."
  —*Cable World*
- "A unique source of professional development."
  —*NEA Today*

[TLC Logo]

A WORLD OF IDEAS

TEACHER TV

Teacher TV is an energetic, upbeat, magazine-style show, shot on location in schools across the country featuring candid profiles of teachers, schools and communities daring to challenge the status quo. It's a place for educators to share techniques, ideas and resources, created with input from thousands of educators. Produced by the two-million-member National Education Association and The Learning Channel, *Teacher TV* television's only national program for, by and about teachers.

[Picture Omitted]

Teacher TV offers practical advice for teachers, parents and the entire community. Go into the classroom with a 22-year-old student-teacher about to teach his very first class. Visit a school that uses interactive videodiscs to teach ninth-grade chemistry to sixth graders. And listen to teachers who've won the Christa McAuliffe Award explain how they use technology to enhance their teaching. Do all this and more on *Teacher TV*, the continuing half-hour series on The Learning Channel.

PROGRAM HIGHLIGHTS

Teacher Presentation

In the next five to ten years, nearly half of America's teachers will retire. Who will teach America? The three segments of this episode address an educational crisis and show some unorthodox methods for training our future teachers. In the first segment, we'll go into a classroom to learn what it takes to become a teacher. In the second segment, we'll examine an innovative five-year training program in Maine. And the third segment will take us to Switzerland, where we'll have an opportunity to see how some of Europe's best teachers ply their trade.

The Changing Role of Schools

With broken families on the rise and social community services on the decline, schools and teachers are often left

to take on the roles of psychiatrist, social worker, counselor, and even father and mother. But at what cost? This episode examines what the extra pressure means to our educational system, as well as how teachers are rising to the challenge of relating to their students in new ways.

[Picture Omitted]

Design A School

Teacher TV explores three schools that have thrown out the manuals and are redesigning themselves. We'll go on location to Indianapolis, Indiana, upstate New York, and Austin, Texas. We'll meet the teachers, parents and students who are revolutionizing the way schools are designed and run. And we'll look at the difficult lessons they're learning in the process.

[Picture Omitted]

[TLC Logo]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 108(h) and in support of plaintiffs' cross-motion for summary judgment, plaintiffs Turner Broadcasting System, Inc., et al. ("the cable program networks"), submit this statement of material facts as to which there is no genuine issue:

1. Cable programming services are full-fledged First Amendment speakers, providing the public with a broad range of video programming. Affidavit of Terence F. McGuirk, Executive Vice President, Turner Broadcasting Systems, Inc., ¶¶ 18-19 & 36; Affidavit of Lisa A. Kerr, Senior Director of Affiliate Relations of National Cable Satellite Corporation, d/b/a/ C-SPAN, ¶ 6. Approximately 80 national, regional, and local cable programming services—commonly called cable program networks—now provide a diverse mix of news, entertainment, public affairs, sports, financial, religious, minority-oriented, and children's programming. McGuirk Affidavit ¶ 11.

2. The named plaintiffs in Civil Action No. 92-2247 are companies that operate 15 cable program networks, including Cable News Network ("CNN"), Headline News, Turner Network Television ("TNT"), The Cartoon Network, The Arts & Entertainment Network ("A&E"), The Black Entertainment Television Network ("BET"), E! Entertainment Television, Lifetime Television Network ("Lifetime"), The Family Channel, C-SPAN, C-SPAN 2, QVC Network, The Travel Channel, USA Network and The Sci-Fi Channel. Amended Complaint, No. 92-2247,

filed November 5, 1992. In addition, Plaintiff Turner Broadcasting System, Inc. owns and operates Station WTBS, Atlanta, Georgia, also known as TBS SuperStation, which is carried on cable systems throughout the country. *Id.* The National Interfaith Cable Coalition, Inc., operating as the Vision Interfaith Satellite Network ("VISN") has moved to intervene in No. 92-2247. Cable program networks The Discovery Channel and The Learning Channel are represented in No. 92-2558, and networks Home Box Office, Cinemax, Comedy Channel, and Courtroom Television Network are represented in No. 92-2495.

3. Cable operators select programming to present to their subscribers from various sources, including local broadcast station signals, signals of distant broadcast television stations, locally-originated cable programming, and cable network programming, and transmit the programming over coaxial and fiber optic cables to their subscribers. McGuirk Affidavit ¶¶ 8, 11; Affidavit of Thomas F. Burchill, President and Chief Executive Officer, Hearst/ABC-Viacom Entertainment Services, ¶ 5. Because cable program networks are distributed almost exclusively through cable systems, they reach only the approximately 60 percent of television homes that subscribe to cable. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(3).

4. Broadcast television stations, by contrast, possess multiple means of transmitting their signals to their audiences. Broadcast stations are licensed by the FCC free-of-charge to utilize specified portions of the radio-magnetic spectrum to transmit their signals over-the-air to the 98 percent of American homes that own television sets. Broadcast stations are also able to transmit their programming over-the-air to cable systems for subsequent retransmission to cable subscribers. Thus, even absent carriage of a broadcast station on a cable system, most television viewers in a broadcast station's licensed community are able to receive the programming of that station. McGuirk Affidavit ¶ 9.

5. While cable system channel capacity has increased during the last decade, many cable systems currently have reached or are close to reaching the limit of their channel capacity. *See* McGuirk Affidavit ¶¶ 24-26; Affidavit of Nickolas Davatzes, President and Chief Executive Officers of Arts & Entertainment Network, ¶ 7; Affidavit of Lee Masters, President and Chief Executive Officer, E! Entertainment Television, Inc. ¶ 6; Affidavit of Joseph M. Segel, Chairman and Chief Executive Officer of QVC Network, Inc., ¶¶ 9-10; Affidavit of Timothy B. Robertson, President and Chief Executive Officer, International Family Entertainment, Inc., ¶¶ 5 & 7; Affidavit of E. Roger Williams, President and Chief Operating Officer, The Travel Channel, Inc., ¶ 6; First Affidavit of Douglas V. Holloway, Senior Vice President-Affiliate Relations, USA Networks, ¶¶ 8-10; Affidavit of Sylvia Sycamore, Senior Vice President Policy, Planning and Administration, Chambers Communications Corp., ¶ 3. Because many cable systems have little or no available channel capacity, competition for cable system carriage is intense, especially for newer cable networks such as The Cartoon Network and The Sci-Fi Channel to obtain cable system carriage. McGuirk Affidavit ¶¶ 24-29; Williams Affidavit ¶ 6.

6. Government imposed rules requiring cable systems to carry broadcast stations—"must carry" rules—harm cable program networks by guaranteeing cable channels for broadcast stations and by forcing cable programmers to compete for a diminished number of available channels on cable seystems. This harm was recognized by the U.S. Court of Appeals for the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169, (1986) and in *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

7. Since the FCC's must carry rules were first struck down as unconstitutional in 1985, the number of broadcast television stations—both commercial and non-commercial—has nonetheless grown significantly. The FCC's own data demonstrates that the total number of full power commercial television stations has increased by more than 25 percent since the decision in *Quincy*. *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1993). The number of noncommercial stations has also grown substantially, increasing approximately 21 percent during the same period. Moreover, the number of low power broadcast television stations has grown dramatically from 343 stations in July 1985 to 1310 in December 1992—a 282 percent increase.

8. FCC factfinding has also demonstrated that since the demise of the FCC's must carry rules, most local broadcast stations are still being carried by cable systems. FCC Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report*, Sept. 1, 1988, at 11, 13. Moreover, roughly 80 percent of the cable systems responding to the FCC survey reported *no* instances of discontinued or denied carriage, while an additional 10 percent of the systems reported discontinuing or denying carriage of a *single* station. *Id.*

9. The elimination of must carry requirements has produced a substantial increase in the number and diversity of cable programming services:

(a) cable program networks have been able to expand their viewing audiences (McGuirk Affidavit ¶ 17; Davatzes Affidavit ¶ 4; Burchill Affidavit ¶ 8; Robertson Affidavit ¶ 4);

(b) new cable networks like TNT and E! Entertainment were successfully launched (McGuirk Affi-

davit ¶ 6; Masters Affidavit ¶ 3; Williams Affidavit ¶ 4; First Holloway Affidavit ¶¶ 4, 7); and

(c) cable program networks have invested substantial resources in original entertainment, informational, news and children's programming, providing a rich diversity of speech to the public. McGuirk Affidavit ¶¶ 18-19; Davatzes Affidavit ¶ 5; Burchill Affidavit ¶ 8; First Holloway Affidavit ¶ 7. Basic cable program networks spent $340 million for programming in 1984; in 1991, that investment in programming had increased to $1.5 billion. H.R. Rep. No. 628, 102d Cong., 2d Sess. 31 (1992).

10. By granting special, federally-mandated carriage privileges to broadcasters, the must carry requirements of the 1992 Cable Act will significantly impair the ability of cable program networks to reach their intended audiences. In order to accommodate additional broadcast stations on their systems, cable program networks—including those of plaintiffs—will be and are being dropped or denied carriage by cable systems. McGuirk Affidavit ¶¶ 27-29; Davatzes Affidavit ¶¶ 6-7; Burchill Affidavit ¶ 10; Kerr Affidavit ¶¶ 9-14; Affidavit of Craig Ronald Sherwood, Vice-President Managing Director of Affiliate Relations, International Family Entertainment, Inc., ¶ 2; Affidavit of David L. Hanson, Vice President of Operations, Marcus Cable Partners, L.P., ¶¶ 3 & 5-6; Affidavit of Joseph A. Wyant, General Manager, Storer Communications of Northern Kentucky, Inc., ¶¶ 6-7; Affidavit of Dana A. Michaelis, Vice President, Affiliate Sales, of The Travel Channel, Inc., ¶ 2; Affidavit of Jonathan B. Marx, Vice President and General Manager, Viacom Cable, ¶ 3; Affidavit of James A. Finch, President, Limestone Cable Vision, Inc., ¶ 3.

11. The channel position requirements of the 1992 Cable Act will also significantly impede the ability of cable program networks to reach their intended audiences

by according broadcast stations special rights to inherently unique cable system channel positions. McGuirk Affidavit ¶¶ 30-35; Davatzes Affidavit ¶¶ 6, 8; Burchill Affidavit ¶¶ 10-11; Segel Affidavit ¶ 11; Robertson Affidavit ¶ 6; First Holloway Affidavit ¶ 11; Hanson Affidavit ¶ 6; Wyant Affidavit ¶¶ 10-11 & 14; Sherwood Affidavit ¶ 3.

12. Relatively new, diverse cable program networks, such as The Sci-Fi Channel, The Learning Channel, The Cartoon Network, and Court TV will be especially burdened by the new must carry and channel position requirements. McGuirk Affidavit ¶¶ 24-29; First Holloway Affidavit ¶¶ 9-10; Second Holloway Affidavit ¶ 3; Williams Affidavit ¶¶ 5-6.

13. The must carry and channel position requirements of the 1992 Cable Act will substantially limit the editorial discretion of cable operators. Affidavit of John w. Goddard, President and Chief Executive Officer, Viacom International Inc., ¶ 4; Affidavit of Jonathan B. Marx, Vice President and General Manager, Viacom Cable, ¶ 3; Affirmation of Richard Conrad, Regional Manager, Adelphia Cable Communications, ¶ 1; Affidavit of James A. Finch, President, Limestone Cable Vision, Inc., ¶¶ 3-4; Wyant Affidavit ¶¶ 7, 9 & 14; Affidavit of Lynette J. Simpson, Vice President of Marketing and Acquisitions, Sun Country Cable, ¶ 9; Second Affidavit of David A. Gardner, Raystay Co., ¶¶ 10-13; Hanson Affidavit ¶ 6; Sycamore Affidavit.

14. The consequences described above occur regardless of the preferences of the viewing public. Cable systems ascertain viewer preferences by means of surveys, focus groups, phone-in numbers, and other methods. Simpson Affidavit ¶ 6; Hanson Affidavit ¶ 4; Wyant Affidavit ¶ 6; Sycamore Affidavit ¶¶ 6-7; Second Gardner Affidavit ¶¶ 5-6. The new must carry requirements will cause cable operators to act in *contravention* of subscriber preferences by forcing them to drop cable program networks sub-

scribers wish to receive in order to carry broadcast stations in which subscribers have expressed little or no interest. Simpson Affidavit ¶¶ 6 & 8-10; Wyant Affidavit ¶¶ 6, 9 & 12; Finch Affidavit ¶¶ 3-4; Conrad Affirmation ¶ 1; Sycamore Affidavit; Second Gardner Affidavit ¶¶ 12-13.

Respectfully submitted,

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Dated: February 12, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFFS' RESPONSE TO NAB'S STATEMENT OF MATERIAL FACTS

Plaintiffs Turner Broadcasting System, Inc., et al. ("the cable program networks"), hereby respond to the Statement of Material Facts of defendant intervenor-applicant National Association of Broadcasters ("NAB") submitted in support of its motion for summary judgment. NAB's statement consists almost entirely of a verbatim repetition of various "findings" contained in Section 2(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Many of the assertions contained therein are not statements of "fact" at all, but rather conclusory assertions of "governmental interests" and policies (*e.g.*, there is a "substantial governmental interest" in promoting a "diversity of views"). Other statements, while arguably of a "factual" nature, are so vague as to preclude a meaningful response (*e.g.*, "the cable television industry has become a dominant nationwide video medium"). With these objections noted, plaintiffs' respond to NAB's statement as follows:

1. Plaintiffs admit that most cable systems in a particular geographic area do not face direct competition from competing cable systems. Plaintiffs further admit that this is a result largely of local franchising requirements, including the common practice of local franchising authorities of granting exclusive franchises and denying the opportunity for further competition. In response to this situation, Congress has now prohibited exclusive fran-

chises and barred local franchising authorities from unreasonably excluding competing cable operators. 1992 Cable Act § 7. The FCC has found not only that competition between cable systems is increasing but also that "several factors are likely to encourage the *further increase* in the number and extent of competitive cable systems." *1990 Cable Report*, 5 F.C.C. Rcd at 5014, 5033-35 (emphasis supplied). The FCC noted, for example, that cable operators were becoming more interested in expanding into markets already served by a cable system as the availability of attractive unwired markets declines. *Id.* Plaintiffs deny that cable operators not facing direct competition from another local operator "face[] no local competition." Cable television competes with various other media outlets for public audiences, including broadcast television. *See Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 196-221 (1985) ("*FCC Fairness Report*"); *In re Complaint of Syracuse Peace Council*, 1 F.C.C. Rcd 5043 (1987); *Order*, 2 F.C.C. Rcd at 5043. Millions of Americans chose not to subscribe to cable even where it is available, *see* H.R. Rep. No. 628 at 30 (noting that cable "passes" more than 95 percent of households, while approximately 60 percent subscribe), and most Americans who subscribe to cable could if they wished cancel their subscriptions at any time and receive broadcast television signals over-the-air by means of an indoor or outdoor antennae. *See In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C. Rcd. 864 (Nov. 28, 1986). Plaintiffs cannot meaningfully respond to the assertion that "the cable operator" has "undue market power," and deny any suggestion that the "market power" of cable operators could somehow be considered uniform throughout the country. Plaintiffs also dispute that the fact that some cable operators do not face direct competition from other cable operators in the same community is material

to the constitutional issue before the court. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247-57 (1974).

2. Plaintiffs admit that approximately 60 percent of American households subscribe to cable television. Whether, when or how much, this percentage will increase in the future depends on a number of variables. The assertion that the "cable television industry" has become a "dominant" nationwide video medium is vague and meaningless and requires no response; to the extent a response is deemed necessary this assertion is denied.

3. The assertion that the "cable industry" has become "highly" concentrated is vague and meaningless and requires no response; to the extent a response is deemed necessary this assertion is denied. The House report acknowledges that the two prevailing measures of market concentration are the "top four firm" concentration ratio and the Herfindahl-Hirschman Index (HHI), and that the Justice Department and "prevailing economic theory" consider market power to exist when the four firm ratio exceeds 50 percent or the HHI exceeds 1,000. H.R. Rep. No. 628 at 42. The report admits that the information submitted to the committee indicated that the HHI index for the top twenty MSOs was 491, "well below the Justice Department's threshold of 1,000," and the committee estimated that the four firm ratio for the largest MSOs was 36 percent, also "less than the Justice Department's 50 percent threshold." *Id.* The assertion that the "potential effects" of such "concentration" are "barriers to entry for new programmers and reduction in the number of video voices" is utterly speculative, conclusory, vague and requires no response; to the extent a response is deemed to be necessary this assertion is denied. The number of MSOs and or their concentration does not meaningfully reflect the "number of video voices" available to consumers, because any single MSO can carry and offer to subscribers a large and diverse "number" of

"voices" on its system(s). Plaintiffs also dispute that the "concentration" ratios of MSOs is a material fact, or that characterizing concentration as "high" somehow justifies special carriage privileges for all broadcasters at the expense of all cable program networks.

4. The sweeping characterization of the "cable industry" as "vertically integrated" is meaningless and requires no response; to the extent a response is deemed necessary this assertion is denied. Plaintiffs admit some operators have made some investments in some program services, and that these investments—as Congress recognized—often "promote diversity and make the creation of innovative, and risky, programming services possible," and have furthered the development of innovative programming services "that would not have been feasible without the financial support of cable system operators." H.R. Rep. No. 628 at 41. *See also 1990 Cable Report*, 5 F.C.C. Rcd at 5009-10 (summarizing benefits of vertical integration and concluding that "[t]he result for the public is an increase in the quality and amount of programming"). With respect to the assertion that affiliations between operators and cable program networks create "incentives" for operators to favor their affiliated networks with respect to carriage, Congress did not find that this *possibility* was in fact an actual, serious problem. Instead, the House report describes a study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce concluding that "common ownership of cable systems and cable programming services does *not* appear to affect adversely the supply of cable programming or the diversity of viewing choices for cable subscribers." *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations*, NTIA Report 88-233, June 1988, at 102 (emphasis supplied). Summarizing the study, Congress stated that "NTIA found that *none of the top five multi-system operators (MSOs) showed a pattern of favoring basic services with which they were affiliated.*" H.R. Rep. No. 628 at 41 (emphasis supplied). Plaintiffs deny that "vertical integration," to the extent it exists in the cable industry, has been harmful to the public's interest in "diverse" video programming.

5. The assertions in Paragraph 5 are not statements of fact and no response thereto is required. Plaintiffs deny burdening the First Amendment freedoms of cable programmers and operators for the benefit of broadcasters promotes any "substantial governmental interest," and deny that "First Amendment interests" are furthered by burdening First Amendment freedoms. The must carry requirements will reduce, not promote, diversity in video programming.

6. The assertions in Paragraph 6 are not statements of fact and no response thereto is required.

7. The assertions in Paragraph 7 are statements of policy, not statements of fact, and no response thereto is required. Plaintiffs do not claim that the government can have no interest in promoting "the local origination of programming," but deny that the government may burden plaintiffs' First Amendment rights to promote that interest, and deny that the must carry requirements Congress has enacted are even remotely tailored to further that interest without unnecessarily burdening the First Amendment freedoms of cable programmers and operators.

8. The assertion that broadcast television stations are an "important source" of local news and public affairs programming is vague, conclusory, and no response thereto is required. Again, plaintiffs do not claim that the government can have no interest in promoting local programming, but deny that the government may burden plaintiffs' First Amendment rights to promote that interest, and deny that the must carry requirements Congress has enacted are even remotely tailored to further that interest without unnecessarily burdening the First Amend-

ment freedoms of cable programmers and operators. Moreover, many cable systems provide their own local public affairs programming, such as Channel 8 in the Washington, D.C. television market.

9. Plaintiffs admit that broadcast television programming is supported by revenues generated from advertising broadcast over stations. Plaintiffs further admit—indeed emphasize—that persons who own television sets "do not require cable transmission to receive broadcast signals." The third sentence of Paragraph 9 is a statement of policy, not of fact, to which no response is required. Plaintiffs specifically deny that the continued availability of free television over-the-air is even slightly threatened in the absence of must carry requirements, as evidenced by, among other things, the fact that there has been a significant *increase* in the number of broadcast stations operating and available to the public since the demise of the FCC's must carry rules in July 1985. Indeed, the total number of broadcast stations, including commercial, noncommercial, and low power stations, has grown in every category —nearly doubling overall since 1985. *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985).

10. The assertion that there has been a "marked shift" in market share from broadcast television to cable television is too vague to permit a specific response. Of course the viewership of broadcast stations has declined from the levels that existed when broadcast television represented the *only* video programming choice available. Affidavit of Terence F. McGuirk, ¶ 12. This, however, hardly reflects or portends "harm" to the public's interest in a "diversity of views." The changes in viewing patterns represents the exercise of the viewing public's right to choose freely among diverse program offerings what the viewer wants to watch. *Id.* The decline in broadcast station audiences is also partially attributable to other programming and entertainment alternatives available to television viewers, for example, prerecorded tapes and video games. *Id.* Again, plaintiffs deny that the public's interest in the continued existence of "local broadcasting" is even slightly threatened in the absence of must carry requirements. *See* paragraph 9, above.

11. Plaintiffs admit that cable television systems and broadcast television stations—and newspapers, radio stations, magazines, billboards, and others—compete for advertising revenues. Plaintiffs deny that the public's interest in the continued existence of "local broadcasting" is even slightly threatened by this competition, or that such competition justifies burdening the First Amendment rights of cable programmers or operators with new must carry requirements. *See* paragraph 9, above.

12. Plaintiffs deny that a cable system which carries the signal of a local television broadcaster is "assisting the broadcaster to increase its viewership" and its potential to attract advertising revenues since the local broadcaster already has access to those households over-the-air. The second and third sentences of paragraph twelve are unfounded speculation, not statements of fact. Plaintiffs deny that the mere fact that cable operators and broadcast stations compete to some extent for advertising revenues creates "a substantial likelihood" that broadcast stations will be dropped from cable systems or repositioned by cable operators for the purpose of harming them, absent a must carry "requirement." 1992 Cable Act § 2(a)(15). Plaintiffs deny that the theoretical economic "incentive" postulated in paragraph 12 has translated into any significant number of real world instances of noncarriage of broadcast stations. Congress admits that it "has *not* found that cable systems are engaging in a widespread pattern of denying carriage of local television stations. . . ."). H.R. Rep. No. 628 at 52 (emphasis supplied). *See also id.* at 67 (noting that "most cable systems have continued to carry a number of local over-the-air signals. . . ."). Further, the principal evidence before Congress relating to noncarriage of broadcast stations, a 1988 FCC Staff

Report, confirms that most broadcast stations *are* being carried by cable systems. FCC Staff Report, Policy and Rules Division of the Mass Media Bureau, Cable System Broadcast Signal Carriage Report, Sept. 1, 1988 ("1988 Staff Report"), at 10. Roughly 80 percent of the cable systems reported *no* instances of discontinued or denied carriage, with an additional 10 percent reporting discontinuing or denying carriage of a *single* station. *Id.* Cable systems seek to provide to their subscribers programming that their subscribers want to receive. If they fail to do so, subscribers can choose not to spend their money on cable service and elect to receive broadcast stations over-the-air by means of an indoor or outdoor antennae. *See Report and Order,* 1 F.C.C. Rcd. 864 (Nov. 28, 1986). The evidence cited above shows that cable systems are in fact choosing to continue to carry most broadcast stations. Plaintiffs deny that the public's interest in the continued existence of "local broadcasting" is even slightly threatened by the number of instances in which local broadcast stations have been denied carriage on cable systems (*see* paragraph 9, above), or that the less than "widespread" number of instances in which noncarriage has occurred justifies burdening the First Amendment rights of cable programmers or operators with sweeping new must carry requirements.

13. Plaintiffs emphatically deny that the "economic viability of free local broadcast television" is, or "will be," "seriously jeopardized." *See* paragraph 9, above. The assertion of NAB's in-house economist that there is a possibility that "the *quality* of service the public receives will be affected, even if stations are able to survive" (Fratrik Affirmation ¶ 6, emphasis in original), even assuming this assertion to be true, could not justify burdening the First Amendment freedoms of cable programmers and operators through imposition of new must carry rules. Such burdens would plainly affect the quality of the programming cable program networks are able to offer.

14. The assertion that consumers who subscribe to cable "often" do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals, is too vague to permit a specific response. Certainly "sometimes" that is true. Similarly, the assertion that most subscribers "do not or cannot" maintain antennas to receive broadcast signals, do not have input selector switches, *"or"* cannot otherwise receive broadcast signals, even if assumed to be true, does not demonstrate that any cable subscriber is actually *precluded* from receiving broadcast signals over-the-air. Rather, this simply shows that subscribers have simply *chosen* not to maintain such enhanced capability because they are satisfied with the offerings of their cable system, including the broadcast stations carried by the system. Nothing in the legislative record suggests that if subscription fees became too high, or if a cable system failed to carry popular broadcast stations that viewers wished to receive, that most viewers who *wished* to do so could not choose simply go back to receiving broadcast stations over-the-air. With respect to the third sentence of paragraph 14, plaintiffs admit that the FCC's must carry requirements existed at the time the Cable Communications Policy Act of 1984 was enacted, but otherwise deny the assertions contained therein.

15. It is unclear what is meant by the "most efficient" distribution system for television programming; plaintiffs therefore are unable to respond meaningfully to the first sentence of paragraph 15 and deny the assertions contained therein to the extent a response is deemed necessary. The second sentence of paragraph 15, asserting that the use of input selector switches is not "an enduring or feasible method of distribution and is not in the public interest," is more of a statement of policy than a statement of fact, but plaintiffs deny it in any event. Again, even assuming most cable subscribers do not maintain indoor or outdoor antennas and input selector switches, this fact simply shows that subscribers are satisfied with the offer-

ings of their cable system, including the broadcast stations carried by the system. The assertion that it is not in the "public interest" for cable subscribers to maintain the ability to receive signals over-the-air is remarkable. There is no evidence that the equipment needed is prohibitively expensive, yet, rather than encouraging use of the capacity of *both* the airwaves and cable systems, Congress has opted to provide duplicative paths for broadcasters to reach program audiences while crowding out the speech of cable program networks. Further, to the extent broadcast stations play a special role during disasters and emergencies (*see* NAB Mem. at 25; S. Rep. No. 92 at 42), the "public interest" clearly would be better served if television viewers were able to receive both cable and over-the-air transmissions, in case one or the other were to become inoperable.

16. With respect to the statement that "broadcast programming that is carried remains the most popular programming on cable systems," plaintiffs admit that certain broadcast programming—particularly network affiliates—tend to be viewed more than cable program networks, but deny that all broadcast stations carried on cable systems or that all broadcast stations generally are uniformly more popular than all cable program networks. Plaintiffs admit that cable programming placed on channels adjacent to popular off-the-air signals often obtains a larger audience than on other channel positions, but this is true of any programming so situated (hence, for example, Station WNYC's desire to be on channel 3 of Time Warner's Manhattan cable system), and this can be attributed in part to the fact that these channel positions also tend to be lower ones more accessible to "grazing." *See* H.R. Rep. No. 628 at 55. With respect to the third sentence of paragraph 16, the benefits of carriage have been *mutual* between cable systems and broadcast stations, but the competitive "balance" will shift dramatically in favor of broadcasters under the must carry/retransmission consent regime Congress has enacted, as cable systems will be forced to carry

less popular broadcast stations without compensation while at the same time having to pay to retransmit the signals of more popular stations. To the extent the last two sentences could be construed as statements of fact, plaintiffs deny them, and deny that broadcasters are entitled to be compensated for cable systems' distribution of programming produced by Hollywood and others.

17. Plaintiffs emphatically deny the assertions contained in paragraph 17. *See, e.g.*, McGuirk Affidavit ¶ 27; Davatzes Affidavit ¶¶ 6-7; Burchill Affidavit ¶ 10; Segel Affidavit ¶¶ 7-10; Collins Affidavit ¶¶ 12 & 17.

18. Plaintiffs deny the assertions contained in paragraph 18, and note that the Sherman Affirmation—which selectively provides Nielsen ratings for 4 cable program networks, two of which had slightly higher ratings and two of which had slightly lower ratings—fails to present evidence establishing the generalized assertion contained in paragraph 18. Plaintiffs also doubt that the allegations contained therein, even if true, are material or would in any way affect the determination of the constitutional issue before the Court.

19. Plaintiffs deny the assertions contained in paragraph 19, and note that the Sherman Affirmation—which selectively provides data for particular stations for a single month in a single market—fails to present evidence establishing the sweeping assertion contained in paragraph 19.

20. The assertion that for "many" cable systems the lack of capacity to accommodate additional cable programming is not a "problem" is too vague to be meaningful and no response thereto is required; to the extent a response is deemed necessary the assertions contained in paragraph 20 are denied. Further, the fact that some cable systems, in the exercise of their editorial discretion, use some channels for multiplexing for the convenience of subscribers does not establish that channel capacity is not a "problem," nor does it controvert the fact that

must carry removes channels from the market that cable program networks otherwise could compete for.

21. Plaintiffs admit that technological developments may, possibly, some day, allow some operators to offer a greater number of channels on some cable systems. Whether this will be technically and economically feasible for a significant number of cable systems remains to be seen. The fact remains, as the affidavits before the Court plainly establish, that available channel capacity presently is very tight, magnifying the impact of the must carry requirements on cable program networks. *See* McGuirk Affidavit ¶¶ 24-26; Davatzes Affidavit ¶ 7; Masters Affidavit ¶ 6; Collins Affidavit ¶¶ 15-17; Segel Affidavit ¶¶ 9-10 & 12; Robertson Affidavit ¶¶ 5 & 7; Williams Affidavit ¶ 6; Holloway Affidavit ¶¶ 8-10. The possibility that capacity might increase at some unspecified and uncertain time in the future is not material to the Court's determination of the constitutional issue in this case.

22. Plaintiffs take no position with respect to the assertions contained in paragraph 22 and leaves any response thereto to cable operators.

Respectfully submitted,

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Dated: February 12, 1993

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFFS' RESPONSE TO INTV'S STATEMENT OF MATERIAL FACTS

Plaintiffs Turner Broadcasting System, Inc., et al. ("the cable program networks"), hereby respond to the Statement of Material Facts of defendant intervenor-applicant Association of Independent Television Stations, Inc.'s ("INTV") submitted in support of its motion for summary judgment. Plaintiffs admit the allegations in paragraph 1, but note that the Act did not become law until October 5, 1992, the date Turner Broadcasting System, Inc., filed its complaint. Plaintiffs admit the allegations in paragraphs 2 through 6. With respect to the allegations contained in paragraph 7, plaintiffs admit that plaintiffs' cross motion for summary judgment is ripe for decision. Defendant intervenor-applicants' motions for summary judgment may not be ripe for decision to the extent that certain issues in dispute may be deemed to be factual in nature. For example, the broadcasters rely heavily on certain conclusory "findings" contained in Section 2(a) of the Act, *e.g.*, that the "economic viability" of free broadcast television will be "seriously jeopardized" in the absence of must carry requirements, which plaintiffs maintain are wholly insupportable. Plaintiffs maintain that the bald assertions that the economic viability of broadcast television is "seriously jeopardized" fail to raise a *genuine* issue of material fact in view of the overwhelming evidence to the contrary. At minimum, if the Court deems this issue to be material, the evidence precludes the Court's adoption of this finding as a matter of fact, and bars

summary judgment for the broadcasters and or the government.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN THE MUST CARRY PROCEEDINGS

Pursuant to Local Rule 108(h) of the Rules of this Court and in support of its Motion for Summary Judgment on its claims against §§ 4, 5 and 6 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), plaintiff Time Warner Entertainment Company, L.P. ("TWE") submits this statement of material facts as to which there is no genuine issue.

The 1992 Cable Act.

1. The 1992 Cable Act became law on October 5, 1992.

The Parties.

2. TWE is organized under the laws of the State of Delaware as a limited partnership, the majority which is indirectly owned and fully managed by Time Warner Inc., a publicly traded Delaware corporation. TWE's principal place of business is located at 75 Rockefeller Plaza, New York, New York.

3. TWE is comprised principally of three unincorporated divisions: Time Warner Cable ("TWC"), which operates cable television systems; Home Box Office ("HBO"), which operates pay television programming services; and Warner Bros., which produces and distributes

motion pictures and television programs. TWE also owns, directly or indirectly, interests in various other cable television programming services, some of which it manages. (Collins Aff. ¶ 10)

4. Defendant Federal Communications Commission ("FCC") is an independent agency of the United States Government created under the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*. The FCC has a principal place of business in Washington, District of Columbia.

The Activities and Operations of TWE as a Cable Operator.

5. Through TWC, TWE owns and operates cable systems in approximately 1,600 franchise areas throughout the United States, which have a combined book value of approximately $8.2 billion, and which reach approximately 6.9 million subscribers. (Collins Aff. ¶ 11)

6. TWC's cable systems have channel capacities that generally range from 30 to 70 channels. (Collins Aff. ¶ 12)

7. TWC and its local divisions exercise editorial discretion in determining which program services should be offered to its subscribers. In making such determinations, TWC personnel choose from among the entire array of programming services that are available based on a variety of factors. The content of programming services is often decisive in making such determinations. (Collins Aff. ¶ 15)

8. TWC cable operators continually refine their channel line-ups so as to increase their appeal and subscriber satisfaction. In 1991 and 1992, TWC conducted over 60 subscriber preference and satisfaction surveys. (Collins Aff. ¶¶ 16-17)

9. In addition to deciding which services to carry, TWC cable operators also decide how services are to be

"packaged" in offerings to subscribers. In most TWC systems, subscribers can choose from among two or more packages or "tiers" of services, for which different prices are charged. TWC systems typically offer a "basic" tier of services and a "standard" tier, with the latter including a large array of satellite-delivered programming services. (Collins Aff. ¶ 18)

10. In developing tiers and in creating a programming package, TWC personnel consider a variety of factors and seek to maximize customer interest and satisfaction. (*Id.* at ¶ 18; Rosenblum Aff. ¶ 5)

11. TWC cable operators also exercise editorial discretion in determining the channel positions on which particular programming will be offered. (Collins Aff. ¶ 19; Rosenblum Aff. ¶ 5) Channel positions are assigned to facilitate tiering, to standardize channel line-ups across systems in a particular locality, or to make the system more accessible to customers. (Rosenblum Aff. ¶ 5)

The Activities and Operations of TWE as a Cable Programmer.

12. TWE operates as a cable programmer principally through its HBO division ("HBO"). HBO operates two programming services known as Home Box Office (the "HBO Service") and Cinemax. HBO also owns and operates, through a joint venture with Viacom International Inc., a programming service known as Comedy Central. (Bewkes Aff. ¶ 2) TWE or its affiliated entities also have interests in various other programming services, including Courtroom Television Network. (Collins Aff. ¶ 10; Bigelow Aff. ¶ 5)

13. Both the HBO Service and Cinemax are premium television programming services, *i.e.*, they are sold to subscribers on a per-channel basis for a monthly subscription fee that is incremental to the monthly fee for the programming tier the subscriber has selected. (Bewkes Aff. ¶ 3)

14. HBO is dependent upon multichannel video programming distributors for conveying their programming to subscribers. The HBO Service and Cinemax are offered to subscribers by cable operators and MMDS and SMATV system operators. They are also offered on a subscription basis to owners of C-band home satellite dishes, both directly by HBO and by packagers of satellite programming. (Bewkes Aff. ¶ 4)

15. HBO has already recently introduced "multiplexing". Under multiplexing, the HBO and Cinemax Services are exhibited to subscribers on two or three different channels, usually at no additional cost to the subscriber. By using differentiated scheduling, different programs appear on each multiplexed channel at a given time in order to appeal to various audiences. Multiplexing is intended to enhance viewing options, to increase subscriber satisfaction, and to better enable HBO to compete with other sources of programming, including broadcast television. Under HBO's multiplexing approach, cable systems have the option of dedicating three channels for HBO or two for Cinemax. (Bewkes Aff. ¶ 8; Kasman Aff. ¶ 2; Collins Aff. ¶ 13)

16. The HBO Service offers a wide variety of programming, including motion pictures, sporting events, concerts and documentaries. Cinemax consists primarily of motion pictures. HBO exercises editorial discretion in determining which programs to include in its program services. In making such determinations, it takes into account such factors as the nature, content and quality of the programming, its acceptance by audiences in other media, its timeliness in relation to current events and issues, and other factors. (Bewkes Aff. ¶ 5)

17. Since its inception, HBO has produced (or others have produced for it) its own programs for exhibition on its programming services, particularly on the HBO Service. Such programs often address issues that are controversial or have great social or political significance. (Bewkes Aff. ¶ 6)

18. Comedy Central, a nonpremium service partially owned by TWE, offers comedy programming, including political satire. Courtroom Television Network, a cable programmer managed and partially owned by TWE, is a nonpremium service that provides coverage of notable, and often controversial, judicial proceedings. Both Comedy Central and Courtroom Television Network are relatively new services, the former being established in April 1991, and the latter in July 1991. (Bewkes Aff. ¶ 2; Bigelow Aff. ¶ 12)

19. TWC cable operators are also active in the production of original programming that is offered to their local subscribers. For example, the New York 1 service recently launched in TWE's New York City cable systems offers continuous 24-hour coverage of local news and events in New York City. (Collins Aff. ¶ 4; Bigelow Aff. ¶ 9)

20. Many cable programmers produce their own programming, devoted to such diverse subjects as news and political events, religious subjects, education, music and general entertainment. (Collins Aff. ¶ 4; Bigelow Aff. ¶ 3)

21. Producing new programming is an expensive endeavor. Recent programming ventures have required expenditures of as much as $75 to $150 million before achieving profitability. (Bigelow Aff. ¶ 4)

TWE Competes with a Wide Variety of Alternate Sources of News, Information and Entertainment.

22. TWC's cable systems compete with a wide variety of alternate sources of news, information and entertainment. In particular, TWC's cable systems compete with broadcast television stations, which, unlike cable systems, offer their programming without direct charges to viewers. (Collins Aff. ¶ 20)

23. Although TWC's cable systems compete with broadcast television stations, the cable industry is differ-

ent from the broadcasting industry. There are no physical limitations on the ability to construct multichannel video distribution systems equivalent to the physical scarcity of the broadcast spectrum. (Collins Aff. ¶ 21)

24. TWC's cable systems also compete with other means of delivering video programming to consumers, including satellite master antenna television ("SMATV") systems, in which apartments in a multiple dwelling unit ("MDU") are connected to antennas that are located on the premises and capable of receiving satellite-delivered program services (some SMATV systems use microwave relays to connect multiple MDUs to a single satellite receiving antenna); multichannel multipoint distribution systems ("MMDS"), often called "wireless cable", which deliver one or multiple channels of programming to subscribers by means of terrestrial microwave antennas; home satellite dishes ("TVROs"), which enable their owners to receive a vast array of programming services that are transmitted by satellite, either through a subscription agreement that is arranged directly with the programmers or indirectly through any of a large number of program packagers, or, in many instances, free of charge; and video cassettes and video disks, which consumers may rent or buy for viewing on home video cassette and disk players. (Collins Aff. ¶ 22)

25. TWC's cable systems also compete with the traditional print media, especially in the provision of news, with radio, especially in the provision of music, and with all these media and broadcast television stations for advertising. (Collins Aff. ¶¶ 22-23)

TWC Has Received Numerous Must Carry Requests.

26. TWC and its affiliated cable operators have received a number of requests for carriage pursuant to the must carry provisions for both commercial stations and noncommercial educational stations. (Apfelbaum Aff. ¶ 2) Cable systems who have received such requests include the following: Yellow Savings (Ohio); Eaton

(Ohio); Troy (Ohio); Tipp City (Ohio); Piqua (Ohio); Paragon Cable (El Paso, Texas); Colorado Springs (Colorado); Tri-County Cable (Salem, New Jersey); Bakersfield (California); American Cablevision (Arvin/Lamont and Tehachapi, California); American Cablevision (Leavenworth, Kansas); Marshall Cable TV (Missouri); Cablevision (Central Florida); Luling Cablevision (Texas); Paragon Cable (Mount Vernon, New York); Cablevision (Savannah, Georgia); and Memphis Cablevision (Tennessee).

The Must Carry Provisions Infringe Upon TWE's Editorial Discretion.

27. If the must carry provisions are upheld, TWC systems will have to add a substantial number of broadcast stations which, in the exercise of their editorial discretion, they would not otherwise carry. Such systems include Bakersfield, California (Grinstead Aff. ¶2-4, attached as Exh. V to Apfelbaum affidavit); Leavenworth, Kansas (Christensen Aff. ¶¶ 3-6, attached as Exh. T to Apfelbaum affidavit); Portland, Maine (Darrell Aff. ¶ 3); Fayetteville, North Carolina (Carey Aff. ¶ 4); and Salem, New Jersey (Rider Aff. ¶¶ 1-3, attached as Exh. U to Apfelbaum affidavit); and Staten Island, New York (Collins Aff. ¶ 26(d)).

28. On average, the 1992 Cable Act requires TWC to relinquish editorial and business control of an estimated 30% of its channels (approximately 8 must carry channels, approximately 2 PEG channels and approximately 3.5 leased access channels). (Collins Aff. ¶ 38) As many as 42 TWC systems may have to carry over an estimated 11 broadcast stations. (*Id.* at ¶ 26(a))

29. If the must carry provisions are upheld, a substantial number of services that TWC's systems presently carry will have to be dropped or repositioned. Such systems include Salem, New Jersey (Rider Aff. ¶ 5; Fayetteville, North Carolina (Carey Aff. ¶ 4); certain systems in

TWC's San Diego Division (Burr Aff. ¶ 5); and certain systems in TWC's Greater Boston Division (O'Connell Aff. ¶ 4). Some systems will incur substantial expense as a result of such displacements. (Rider Aff. ¶¶ 8-12; Carey Aff. ¶ 3)

30. As a result of the must carry provisions, including the channel positioning provisions, TWC's systems in Manhattan recently engaged in litigation with a local non-commercial broadcast station, WNYC-TV, that culminated in proceedings before this Court. During the latter part of 1992, a realignment process was commenced for the channels on all TWC's New York City cable systems, including the Manhattan systems. The objective of the realignment process was to harmonize the offering of programming to subscribers, such that the same programming services would be carried on the same channel position in all of the New York City cable systems affiliated with TWC. The realignment plan was intended to maximize the satisfaction of the current subscribers and present a channel lineup which would be most attractive to potential subscribers. As part of the initial step of a complete realignment plan, WNYC-TV was moved on February 1 from Channel 3 to Channel 31 on TWC's two Manhattan systems. Channel 31 is its off-air broadcast channel as assigned by the FCC and the channel on which WNYC-TV was carried on the other TWC New York City systems. (Rosenblum Aff. at ¶¶ 8-9)

31. Pursuant to the must carry provisions of the 1992 Cable Act, WNYC-TV attempted to stop the realignment process. After having been informed that it would be moved to Channel 31, WNYC-TV requested carriage pursuant to § 5 of the 1992 Cable Act, and requested channel positioning on Channel 3. The request, including the channel position request, was denied on December 21, 1992. One month later, WNYC-TV petitioned the FCC for emergency relief; its petition was denied on January 22, 1993. The Second Circuit Court of Appeals denied

WNYC-TV's petition for a temporary restraining order on January 28, 1993. WNYC-TV's application for a temporary restraining order to this Court was denied on February 1, 1993. (Rosenblum Aff. ¶ 10)

Loss of Available Channel Capacity to TWE's Programming Interests.

32. The dedication of channel capacity required under the must carry provision sharply diminishes the number of cable channels on which HBO's programming can be provided. (Bewkes Aff. ¶ 9; Kasman Aff. ¶¶ 5-6) The must carry provisions have impeded HBO's efforts to provide its programming services in the multiplexed format. (Bewkes Aff. ¶ 11; Kasman Aff. ¶¶ 2-6; Hanson Aff. ¶¶ 2-3)

33. The channel positioning provisions allow local broadcast television stations to demand carriage on channels currently occupied by one of HBO's programming services thereby forcing HBO's services to other channels. (Bewkes Aff. ¶ 12)

34. Similarly, the must carry regime deprives those non-premium services in which TWE holds an interest of channel capacity which would otherwise be available and constitute an opportunity for additional distribution. (Bigelow Aff. ¶¶ 11-12)

Dated: Washington, D.C.
February 12, 1993

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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PLAINTIFFS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 108(h), Plaintiffs Discovery Communications, Inc. and The Learning Channel, Inc. submit, in conjunction with their motion for summary judgment, the following statement of material facts as to which there is no genuine issue.

The Discovery Channel

1. The Discovery Channel was founded in 1985 and since then has grown to become the fifth largest cable network with approximately 59 million subscribers, or 96% of the televisions wired for cable.

2. The Discovery Channel features nonfiction documentaries about science, nature, technology, human events and history. Among The Discovery Channel's programs are "The Natural World", "Wildlife Chronicles", "In the Company of Whales," "Red Sea," "Russia: Live From The Inside," "Africa Safari: Live," "People of the Forest," and "Ivory Wars." The Discovery Channel also provides a series of programs with The Smithsonian Institution called "Invention", each original episode of which focuses on different inventions. A number of The Discovery Channel's special programs have won Emmys and Ace Awards.

3. Each week in "Discovery Journal", The Discovery Channel presents issues of social and political significance. Among the subjects covered are famine, over-population, organ donation, capital punishment and AIDS.

4. The Discovery Channel also includes public affairs programming. For example, in February 1992 The Discovery Channel provided a block of 20 minates free time to each of the major Presidential candidates; more than 1.5 million people watched the candidates on the The Discovery Channel sponsored forum, Address To The Nation, which was anchored by Walter Cronkite.

5. The Discovery Channel competes directly with over-the-air broadcasting.

The Learning Channel

6. Discovery Communications acquired The Learning Channel in 1991 as a complementary service to The Discovery Channel. The Learning Channel is regarded as a start-up channel because of the substantial changes made to it after its acquisition and relaunching in October 1991. As a start-up channel, The Learning Channel usually competes for one of the last available spaces a cable operator has available for programming.

7. The Learning Channel features educational programs for viewers of all ages. The Learning Channel schedule includes six hours of commercial-free preschool educational programming every weekday called "Ready, Set, Learn"; programs such as "The Learning Channel Elementary School" and "Mad Math" for elementary school children; weekly programs such as "Ten Great Writers" for high-school age and other viewers; and adult education programs such as "Learn to Read" which gives adults the opportunity to learn to read in the privacy of their own homes.

8. Regular series on The Learning Channel include "Ancient Journeys", "Archeology", "A Traveler's Journal", "The World: A Television History", "Civilization" and "Science Frontiers." These programs provide a broad prospective on history, world culture, science, sociology and anthropology.

9. The Learning Channel currently provides 18 hours of programming every day of the week. It is carried on approximately 15% of cable systems in the United States.

10. Prior to the passage of the Cable Act of 1992, The Learning Channel's efforts to expand its carriage were succeeding. The Learning Channel was adding 400,000 new subscribers per month by late summer 1992.

11. After the Cable Act became law, The Learning Channel's growth slowed substantially. The Learning Channel now projects it will add fewer than 75,000 subscribers per month on average, and The Learning Channel may even experience a loss of subscribers as cable operators replace it with must-carry programming mandated by the Act. The Learning Channel currently has about 17.5 million subscribers.

The Technologies of Broadcasting and Cable

12. Broadcast television and cable television have wholly different technologies. Broadcasters radiate electromagnetic waves from transmitters. The waves are intercepted by the viewers' television receivers and translated to produce video images. Because of the physical limits of the electromagntic spectrum, the number of broadcasters in any area at any time is physically limited. Thus, limited regulation and allocation of the airwaves is essential for over-the-air broadcasters.

13. Cable networks, such as The Discovery Channel and The Learning Channel, sell their programs to cable system operators, who retransmit the programs over coaxial and fiber optic cables to subscribers. The Discovery Channel and The Learning Channel also license their services in other alternative technology markets, includ-

ing the SMATV, MMDS and TVRO markets. The number of channels that can be distributed by cable and the alternate technologies are not limited by the electromagnetic spectrum, although for economic reasons most cable system operators usually carry between 36 and 54 channels.

Injury to The Discovery Channel and The Learning Channel by the Cable Television Consumer Protection and Competition Act of 1992

The Must-Carry Provisions

14. Sections 614 and 615 of the Communications Act of 1934, as added by sections 4 and 5 of the 1992 Cable Act, require each cable system to carry local commercial over-the-air broadcast stations on as much as one-third of the cable operator's channel capacity, plus low power stations and non-commercial educational stations.

15. Each cable system has a finite number of channels for transmitting programs. The requirement that each cable operator dedicate substantial capacity to over-the-air broadcast programs limits the number of channels available for cable signals. Moreover, cable operators now operating at full capacity will be required to drop cable networks to comply with the must-carry provisions.

16. Cable networks such as The Discovery Channel and The Learning Channel must compete for the remaining available usable channels. Cable networks are therefore necessarily less likely to be carried than the over-the-air broadcast stations, which must be carried. Popular networks, such as The Discovery Channel, will face artificially stiffer competition for the remaining channels. Newer networks, such as The Learning Channel, face exclusion.

17. Prior to the Act, The Learning Channel frequently vied for one of the last available channel positions in a cable system. After the Act, The Learning Channel has

experienced greater difficulty as available space has been constricted by the must-carry provisions. The Learning Channel has been rejected or threatened with deletion by cable operators to make channel space available for the broadcast signals which must be added pursuant to the must-carry provisions of the Act.

18. The must-carry provisions of the 1992 Cable Act also reduce the audience for The Discovery Channel. While The Discovery Channel is now carried on the basic service tier by most of its cable operator customers, the must-carry provisions will cause The Discovery Channel to be moved to higher programming tiers which are targeted at narrower audiences. As a result, The Discovery Channel will lose advertising revenue and have to cut back on its programming efforts, at the same time favored broadcast television channels will have artificially larger audiences.

19. The 1992 Cable Act's requirement that cable operators must carry local over-the-air broadcast stations has harmed TLC. Cable operators who had been considering adding TLC have not done so because of the need to preserve channel space for mandated local over-the-air broadcasting stations. Among the cable operators who have refused to add The Learning Channel because of the Act's requirements are Continental Cablevision in Stockton, California, Continental Cablevision in Marysville, California, and Bresman Cable in Essexville, Michigan.

20. The must-carry provisions of the Act also will cause The Learning Channel to be dropped by some cable operators to make room for additional local broadcast stations. For example, TKR in Piscataway, New Jersey has informed The Learning Channel that it may have to drop three cable networks, which may include The Learning Channel, in order to add three local independent broadcasters as required by the Act.

The Channel Positioning Requirements

21. Sections 614(b)(6) and 615(g)(5) of the Communications Act of 1934, as added by the 1992 Cable Act, require each cable operator to retransmit the mandatorily carried over-the-air stations on the channel number on which each such station is currently broadcast, or was broadcast on stated dates, as set forth in the Act.

22. Channel positioning is a significant factor affecting the size of the audience reached. Lower channel numbers, and channels in proximity to other popular channels typically reach larger audiences. Cable networks such as The Discovery Channel with preferable channel positions face displacement to less favorable channel positions by over-the-air broadcast stations. Also, cable audiences associate networks like The Discovery Channel with the channel on which they have traditionally been carried. Cable networks forced to change channels will lose audience recognition. New networks like The Learning Channel will be totally foreclosed from more favorable slots no matter how good the programming.

23. Requiring cable operators to give preference to over-the-air broadcast programmers in making channel assignment invades the editorial judgment of cable operators and denies cable programmers access to positions statutorily granted to over-the-air broadcast stations.

Leased Access

24. Under the leased access provision, cable operators are required to make a certain percentage of their channels available for commercial use under rates, terms and conditions set by the FCC.

25. Each cable system has a finite number of channels for transmitting programs. The requirement that each cable operator dedicate substantial capacity to leased access limits the number of channels available for other cable signals.

26. Cable networks such as The Discovery Channel and The Learning Channel must compete for the remaining available usable channels. Cable networks are therefore necessarily less likely to be carired than leased access broadcasters, which must be carried. Cable networks such as The Discovery Channel and The Learning Channel will face artificially stiffer competition for the remaining channels.

Respectfully submitted,

/s/ Allan A. Tuttle
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

NATIONAL CABLE TELEVISION ASSOCIATION, INC.'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiff National Cable Television Association, Inc. (NCTA) submits this Statement of Material Facts as to Which There Is No Genuine Issue in support of its motion for summary judgment in Civil Action No. 92-2495.

1. Plaintiff NCTA is the principal trade association of the cable television industry in the United States. NCTA represents owners and operators of cable systems serving over 80 percent of the nation's 57.2 million cable households, as well as more than 60 national and regional cable programming networks. Affidavit of Gregory L. Klein ¶ 4.

2. Cable television operators determine what programming will be carried on their systems by selecting among various programming sources. These include commercial and noncommercial broadcast stations; national "basic" cable networks; "premium" networks; regional cable programming; and programming developed by cable operators themselves. Klein Affidavit ¶ 6; Affidavit of Michael J. Egan ¶ 5.

3. Currently, 80 national and 48 regional cable networks offer programming, and 14 more networks are planned. Klein Affidavit ¶ 6.

4. In the future, emerging technologies such as high definition television (HDTV) and interactive programming, as well as innovative services like the presentation of films at staggered starting times on different channels, will compete with traditional sources of programming for available channel capacity. Klein Affidavit ¶ 11.

5. Cable television systems have a defined channel capacity. The average capacity of all systems in the United States is about 40 channels. In 1992, 88 percent of all systems for which capacity information was available had a capacity of fewer than 54 channels. Klein affidavit ¶ 7.

6. About 2,000 cable systems, serving one-third of all cable subscribers, currently have no excess channel capacity available for use. Klein Affidavit ¶ 8.

7. Upgrading or rebuilding a local cable system to increase channel capacity requires large capital investments, generally in the millions of dollars. Klein Affidavit ¶ 9.

8. For the foreseeable future, the supply of available programming will exceed the carriage capacity of almost all local cable systems. Klein Affidavit ¶ 10; Egan Affidavit ¶ 6

9. Sections 4 and 5 of the 1992 Cable Act will require cable television operators involuntarily: (a) to carry certain broadcast stations they otherwise would not retransmit; (b) to offer all subscribers certain broadcast stations as part of basic cable service; and (c) to give those stations preferential treatment in channel assignment. Egan Affidavit ¶¶ 8-13; Affidavit of Joseph J. Collins ¶ 33, *Time Warner Entertainment Co. v. FCC*, Civ. Action No. 92-2494; Affidavit of Terence F. McGuirk ¶¶ 27-29, *Turner Broadcasting System, Inc. v. FCC*, Civ. Action No. 92-2247.

10. Also as a result of the 1992 Cable Act's must-carry requirements, cable operators will deny carriage to non-broadcast programming, delete non-broadcast pro-

gramming from their basic service, and reassign non-broadcast programming to less favorable channel positions. Egan Affidavit ¶¶ 8, 13; Collins Affidavit ¶ 33(b); McGuirk Affidavit¶¶ 28-29; Affidavit of Douglas V. Holloway ¶ 9, *Turner*; Affidavit of Lee Masters ¶ 6, *Turner*; Affidavit of Timothy B. Robertson ¶ 7, *Turner*.

11. Inclusion in a cable system's basic service (as opposed to an optional service tier) and placement on a lower-numbered channel (as opposed to a higher-numbered one) increase the viewership of particular programming. Declaration of John Hendricks ¶¶ 35, 37, *Discovery Communications, Inc. v. United States*, Civ. Action No 92-2558; Affidavit of Nickolas Davatzes ¶ 9, *Turner*; Robertson Affidavit ¶ 6; Affidavit of Joseph M. Segal ¶ 11, *Turner*; Holloway Affidavit ¶ 11.

12. The number of operational, commercial broadcast television stations in the United States rose from 919 in 1986 to 1118 in 1992, an increase of 22 percent. More commercial broadcast stations than ever before were on the air in 1992. Klein Affidavit ¶ 14.

13. The number of operational, noncommercial educational broadcast television stations in the United States rose from 316 in 1986 to 363 in 1992, a 15 percent increase. More educational television stations than ever before were broadcasting in 1992. Klein Affidavit ¶ 14.

14. In October 1991, broadcast television stations were licensed in 594 different U.S. cities, 80 more cities than in August 1985. Klein Affidavit ¶ 15.

15. Thirty-five percent of all television-watching households in the United States receive only broadcast television. Klein Affidavit ¶ 16.

16. Independent commercial broadcasting stations and public broadcasting stations claimed an approximately constant share of all television viewing between the 1985 86 season and the 1991 92 season—about a 20

share and a 3 share, respectively. The top 3 commercial broadcast networks experienced a decline in their share of viewing from a 66 share during the 1985 86 season to a 54 share in 1991 92, but they remain the most-watched programming on television. In total, broadcast programming accounted for more than 70 percent of all television viewing during the 1991 92 season. Klein Affidavit ¶ 17.

17. Ninety-two percent of all television advertising revenue goes to broadcast television. Less than 8 percent goes to cable television. Hendricks Declaration ¶ 35.

18. The average U.S. cable system carried 8.57 local broadcast signals in 1990, 7 percent more than it carried in 1986. Klein Affidavit ¶ 13.

19. Thirty-four of the more than 1500 U.S. cities served by a daily newspaper are served by two or more dailies under separate ownership; as of 1991, there were 53 instances in which two or more cable systems served the same geographic area. Klein Affidavit ¶ 18.

20. Cable television does not rely on broadcast technology and limitations on cable transmission are not attributable to the physical scarcity of the electromagnetic spectrum. Klein Affidavit ¶ 5.

Respectfully submitted,

/s/ H. Bartow Farr, III
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF MARC J. APFELBAUM

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MARC J. APFELBAUM, being duly sworn, deposes and says:

1. I am Associate General Counsel and Assistant Secretary of Time Warner Cable, a division of Plaintiff Time Warner Entertainment Company, L.P. ("TWC").

2. Notwithstanding the fact that Section 4 of the 1992 Cable Act is not yet in effect, Time Warner Cable and affiliated systems around the country have received several demands for carriage from local commercial television stations, including a religious programming station.

3. Time Warner Cable and affiliated cable systems around the country have also received numerous must carry requests pursuant to Section 5 of the 1992 Cable Act, a number of which are described below.

4. Several TWC systems in Ohio received written must carry requests sent jointly by WPTD and WPTO, which, according to the requests, are noncommercial stations based in Dayton, Ohio, and Oxford, Ohio, respectively. WPTD and WPTO requested carriage under Section 5 on the Yellow Springs cable system, the Eaton cable system (which serves both Eaton and Germantown), the

Troy cable system, the Tipp City cable system, and the Piqua cable system. (Attached as Exhibits A-F are letters requesting carriage of WPTD and WPTO.)

5. Paragon Cable of El Paso, Texas received a written must carry request from KSCE, which purports to be a noncommercial station based in El Paso. (Attached as Exhibit G is the letter requesting carriage of KSCE.)

6. Colorado Springs Cablevision of Colorado Springs received a written must carry request from KBDI, which, according to the request, is a local noncommercial station. (Attached as Exhibit H is the letter requesting carriage of KBDI.)

7. Tri-County Cable in Salem, New Jersey received a written must carry request from WYBE, which, according to the request, is a noncommercial station based in Philadelphia, Pennsylvania. (Attached as Exhibit I is the letter requesting carriage of WYBE.) Although the request was later withdrawn (letter of withdrawal attached as Exhibit J), it could be reinstated at any time under Section 5 of the 1992 Cable Act.

8. TWC's Bakersfield Division in Bakersfield, California received a written must carry request from KVPT, which, according to the request, is a noncommercial station based in Fresno, California. (Attached as Exhibit K is the letter requesting carriage of KVPT.) American Cablevision of Arvin Lamont and Tehachapi, California also received a written must carry request from KVPT. (Attached as Exhibit L is the letter requesting carriage in Arvin Lamont.)

9. American Cablevision of Kansas City, Missouri received a written must carry request from KTWU, which, according to the request, is a noncommercial television station based in Topeka, Kansas. (Attached as Exhibit M is the letter requesting carriage of KTWU.)

10. Marshall Cable TV in Marshall, Missouri received a written must carry request from KMOS, which, according to the request, is a noncommercial public television station out of Warrensburg, Missouri. KMOS requested carriage "upon any and all of the cable systems that your company and its subsidiary firms own and/or operate within the KMOS-TV Grade B broadcast radius (see enclosed contour map)." KMOS enclosed a list of communities in which it expected carriage but stated that "[t]he attached list of communities is not to be construed as inclusive of the full extent of this request." (Attached as Exhibit N is the letter requesting carriage of KMOS.) Marshall Cable TV, the only TWC system operating within KMOS's broadcast radius, already carries KMOS on that station's regular broadcast channel.

11. Cablevision of Central Florida received a written must carry request from WCEU, which, according to the request, is a noncommercial station based in Daytona Beach. (Attached as Exhibit O is the letter requesting carriage of WCEU.)

12. Luling Cablevision in Luling, Texas, received a written must carry request from KLRN, which, according to the request, is a noncommercial station based in San Antonio. (Attached as Exhibit P is the letter requesting carriage of KLRN.)

13. Paragon Cable of Mount Vernon, New York, received a written must carry request from WNYC-TV, which, according to the request, is a noncommercial station based in Manhattan. (Attached as Exhibit Q is the letter requesting carriage of WNYC-TV.)

14. Cablevision of Savannah, Georgia, received a written must carry request from WJWJ, which, according to the request, is a noncommercial station based in Beaufort, South Carolina. (Attached as Exhibit R is the letter requesting carriage of WJWJ.)

15. Memphis Cablevision received a written must carry request from WMAV, which, according to the request, is a noncommercial station based in Oxford, Missis-

sippi. (Attached as Exhibit S is the letter requesting carriage of WMAV.)

16. Some of the hardships which these must carry requests impose on TWC are described in the affidavits of Stephanie L. Chistensen, Vice President of Customer Service of American Cablevision of Kansas City; Michael J. Rider, General Manager of Tri-County Cable in Salem, New Jersey; and Charles William Grinstead, President of TWC's Bakersfield, California Division, attached as Exhibits T, U, and V respectively. Hardships resulting from the must carry provisions are also documented in the affidavits of Jeffrey Bewkes, Thayer Bigelow, Ann Burr, William Carey, Joseph Collins, Jeff Darrell, David Hanson, Matthew Kasman, Terry O'Connell, and Barry Rosenblum, submitted separately.

/s/ Marc J. Apfelbaum
MARC J. APFELBAUM

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JEFFREY BEWKES

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

Jeffrey Bewkes, being duly sworn, deposes and states as follows:

1. I am President and Chief Operating Officer of Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. ("TWE"). I have held that position since TWE's formation in June of 1992. Prior to that, I held the same position with HBO's predecessor, Home Box Office, Inc. I first joined Home Box Office, Inc., in 1979.

Home Box Office

2. HBO operates two programming services: the Home Box Office Service ("the HBO Service") and the Cinemax Service. HBO also owns and operates, through a joint venture with Viacom International, Inc., a programming service known as Comedy Central.

3. The HBO and Cinemax Services are premium television programming services, *i.e.*, they are each generally sold to subscribers for a monthly subscription fee in addition to the monthly fee for the programming tier the subscriber has selected.

4. The HBO and Cinemax Services are offered to subscribers by cable operators, multichannel multipoint dis-

tribution services ("MMDS") and satellite master antenna television ("SMATV") system operators. They are also offered on a subscription basis to owners of C-band home satellite dishes, both directly by HBO and by packagers of satellite programming such as Superstar Connection, Consumer Satellite System, and the National Rural Telephone Cooperative, which HBO has authorized to act as distributors.

5. The HBO Service offers a wide variety of programming including motion pictures, sporting events, concerts, and documentaries. The Cinemax Service primarily offers motion pictures. HBO exercises editorial discretion in determining which programs to include—and which programs not to include—in its programming services. In making such determinations, it takes into account, among other things, the nature, content, and quality of the programming, its acceptance by audiences in other media, its distinctiveness to HBO's programming services, and its timeliness in relation to current events and issues.

6. Since its inception, HBO has produced (or others have produced for it) its own programs for its programming services, particularly for the HBO Service. Such programs often address social or political issues of a controversial nature, and therefore might not be shown on network television, which is subject to broadcast content restrictions and the willingness of advertisers to support such programs. In recent years, for example, HBO has produced (or others have produced for it) notable programs on such subjects as abortion (*A Private Matter*; *The Becky Bell Story: Public Law 106*; *Abortion: Desperate Choices*), gun control (*Without Warning: The James Brady Story*; *Guns: A Day in the Death of America*), AIDS (*AIDS: Everything You and Your Family Need to Know . . .*; *Common Threads: Stories from the Quilt*, *First Love Fatal Love*) and children's advertising (*Buy Me That!*; *Buy Me That Too!*). *See generally* Bill Carter, *HBO as a Modern-Day Dickens*, N.Y. Times, November 1, 1992, at F5 (attached hereto as Exhibit A).

HBO has also produced (or others have produced for it) programs criticizing major U.S. corporations and the U.S. government, such as *Afterburn* (criticizing the U.S. Air Force and General Dynamics in the handling of the death of a pilot in an F-16 test flight) and *The Tragedy of Flight 103* (criticizing the Federal Aviation Administration and Pan American World Airways). HBO also produces programming for others, including broadcasters.

7. To attract new subscribers to its services, HBO offers "free previews" of its programming to subscribers who do not already receive its programming. During these free previews, local cable systems unscramble the signals for HBO and Cinemax so that all subscribers may receive these premium channels. Free previews are an effective marketing tool for HBO. They are also well received by cable operators because, in addition to increasing subscribers, they offer a free benefit—a weekend of premium programming at no cost—to subscribers, even if they do not eventually subscribe to the services. In January, 1993, HBO offered free previews to non-HBO subscribers. Because of the 1992 Cable Act's restrictions on the presentation of free previews, many cable systems did not offer this preview. The January preview was less effective than the previous three previews that we have offered. I believe that this was due at least in part to the 1992 Cable Act's restrictions.

8. HBO has also recently introduced "multiplexing". Under multiplexing, the HBO and Cinemax Services are exhibited to subscribers on two or three different channels, usually at no additional cost to the subscriber. By using differentiated scheduling, different programs appear on each multiplexed channel at a given time in order to appeal to various audiences. Multiplexing is an innovative technique, pioneered by HBO, that is intended to enhance viewing options, to increase subscriber satisfaction, and to better enable HBO to compete with other sources of programming, including broadcast television.

9. The must-carry, public, educational and governmental ("PEG") access, and leased-access provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") cause injury to HBO in a variety of ways. The 1980s produced a steady increase in the number of available programming services, and, as a result, most cable operators have few or no excess channels. By compelling cable operators to devote channel capacity to broadcast, PEG, and leased-access programming that they would not otherwise provide, the must-carry, PEG, and leased-access provisions sharply diminish the number of cable channels on which HBO's programming can be provided. These restrictions therefore curtail HBO's opportunities to communicate information and entertainment.

10. Similarly, by requiring DBS operators to reserve from 4 to 7 percent of their channel capacity for noncommercial programming of an educational or informational nature, Section 25 of the 1992 Cable Act diminishes the number of channels on which such operators can provide HBO's programming. This restriction therefore also curtails HBO's opportunities to communicate information and entertainment.

11. Moreover, the must-carry, PEG, and leased-access provisions will seriously impede HBO's efforts to provide its HBO and Cinemax services in multiplexed format. The ability of cable operators to make additional channels available is crucial to HBO's efforts to provide its services in a multiplexed format. By diminishing the available channel capacity, the must-carry, PEG, and leased-access provisions impair HBO's ability to engage in multiplexing, thereby diminishing viewing options to HBO and Cinemax subscribers, reducing subscriber satisfaction, and limiting HBO's effectiveness as a competitor.

12. The channel positioning provisions of the 1992 Cable Act will cause further injury to HBO. These provisions will allow local broadcast television stations to demand carriage on a channel that is currently occupied by one of HBO's programming services, forcing the cable operator to move the cable programming services to another channel. The likely result of such a displacement will be consumer confusion, and, ultimately, a loss of subscribers unless the cable operator is willing to undertake an extensive and costly notification program well in advance.

13. HBO regularly examines opportunities to start up new programming services, which in the past have included (in addition to the HBO Service itself) the Cinemax Service, Festival, and the Comedy Channel (to which Comedy Central is a successor). In today's competitive environment, exclusive arrangements can be decisive in securing carriage for new services, as cable operators have often been unwilling to add new services (which are generally perceived as riskier than established services) unless offered an exclusive arrangement. Limitations on HBO's ability to offer exclusive arrangements to cable operators would hamper its efforts to secure carriage for new services, and will thus work as a disincentive to the development of new services. The likely net effect of the exclusive license provisions, then, is to inhibit, not encourage, the development of new programming services by those companies that have the greatest interest in providing a wide variety of programming services. In addition, the likely effect of the exclusive license provisions will be to stifle capital investment by those companies in the programming services of others.

14. Moreover, many of HBO's competitors are not vertically integrated and, thus, not subject to standardized terms and conditions or exclusive license restrictions of the 1992 Cable Act. For example, the Disney Channel, USA Network, and the Weather Channel are all popular programming services owned by companies that, so far as I am aware, have no corporate affiliation with any

cable operator. *See* Cable Network Ownership Chart, Cable TV Programming (April 30, 1992) (attached hereto as Exhibit B). Accordingly, HBO will be at a significant competitive disadvantage.

/s/ Jeffrey Bewkes
JEFFREY BEWKES

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF E. THAYER BIGELOW

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

E. Thayer Bigelow, being duly sworn, deposes and states as follows:

1. I am President and Chief Executive Officer of Time Warner Cable Programming ("TWCP"), a division of Time Warner Cable ("TWC"), which itself is an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE"). I have been involved in the cable industry since 1970. Indeed, at various times I have served as President of Home Box Office, Inc. ("HBO") and Manhattan Cable Television, Inc.

2. TWC is a cable operator with cable programming interests. The accompanying affidavit of Joseph J. Collins discusses TWC generally in its role as a cable operator and the injuries that the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") will inflict on TWC and its divisions, primarily in their roles as cable operators. I will discuss TWC in its role as a programmer and the injuries that the Cable Acts will inflict on TWC and its divisions, primarily in their roles as programmers. The accompanying affidavit of Jeffrey Bewkes discusses HBO, which is also an unincorporated division of TWE, and the

injuries that the Cable Act will inflict on HBO as a programmer.

Programming Background

3. Many cable programmers produce their own programming, devoted to such diverse subjects as news and political events, religious subjects, education, music and general entertainment. Such programming reflects its originator's distinctive approach and point of view. In addition, when they make use of programming created by others, programmers exercise substantial editorial discretion in determining what to include—and what not to include—in the programming services that they offer. Cable programmers also decide, as any speaker does, where, when, by what means, to whom and on what terms they wish to communicate the news, information and entertainment that they offer.

4. Producing new programming is a very expensive and risky endeavor. Recent programming ventures have required expenditures of as much as $75 to $150 million before achieving profitability. This is a substantial amount of money in its own right. However, combined with the unpredictability and changing tastes of the television viewing public, it is even more of an investment risk.

5. To attract carriage of new programming, programmers, including Courtroom Television Network, a cable programmer managed and partially owned by TWC, have offered exclusive licensing agreements to cable operators. Exclusive licensing agreements are crucially important in the distribution of news, information and entertainment. Each media speaker, whether a newspaper, a broadcast television station, or a cable operator, strives to differentiate itself from other sources of news, information and entertainment by entering into exclusive license agreements to ensure that the material it offers will not be duplicated by other outlets. An example of the benefits that may be derived from advocating a strong policy of exclu-

sivity is the success of Turner Network Television ("TNT"). Time Warner Inc., the parent of TWE, is an investor in Turner Broadcasting Co., which operates TNT, and therefore I am generally familiar with its development. It is my belief that a portion of the great success that TNT has enjoyed is due to its policy of entering into exclusive license agreements with cable operators. Indeed, it is my belief that TNT achieved the greatest distribution in the shortest period of time of any service in cable programming history.

6. Indeed, many cable services, such as TNT and Courtroom Television would never have gotten started if the cable operator investors had not believed they could obtain the services on an exclusive basis, and thus differentiated themselves from their noncable competitors. If you have to give a service you developed to your competitor, there is significantly less incentive to develop the service.

7. Exclusive agreements are also valuable in spurring the development of new programming services. Such agreements assure a prospective distributor that others will not "free ride" on the distributor's efforts to promote and sell the new service. They also encourage distributors to make a greater investment in promotional and sales efforts by holding out the possibility of greater returns that exclusive distributorship of a popular product may permit.

8. Exclusive licensing agreements are attractive to cable operators because they allow them to differentiate their programming from that of their competitors, whether they be other cable operators, broadcasters, satellite master antenna television ("SMATV") systems, multichannel, multipoint distribution systems ("MMDS") or direct broadcast satellite ("DBS") systems. Exclusive licensing agreements are attractive to programmers because they not only allow programmers to attract investors, but

also to maximize their profits. Courtroom Television Network has entered into exclusive agreements for such reasons. As the United States Department of Commerce found:

> "Both buyer and seller can benefit from the availability and enforceability of exclusive rights. For the buyer, exclusivity may differentiate the programming, making it more marketable. For the seller, by using exclusivity as a concept to divide the range of possible licensees into different markets, the seller can arrange a sequence of distribution that will maximize revenue from the licensing of that product through several uses."

U.S. Department of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, at 109-10 (1988) (footnotes omitted) (relevant pages attached hereto as Exhibit A).

9. TWC cable systems are themselves active in the production of original programming that is offered to their local subscribers. In New York City, Time Warner Cable of New York City recently launched a 24-hour all-news channel, called "New York 1", which offers continuous coverage of local news and events in New York City. The TWC systems located in Ithaca and Rochester, New York, also produce and offer local news programs to their subscribers. Several TWC systems also offer local news segments produced exclusively for them by others, including local broadcasters. Many of TWC's cable systems also engage in the creation and production of other original programming to some extent.

10. Since the passage of the 1992 Cable Act, however, TWC has not invested in or began developing any new video programming services. TWC and other potential investors have little confidence in the ability of any new programming to obtain distribution under the 1992 Cable

Act's regulatory scheme. The rate regulation provisions, must carry requirements, and exclusive agreement restrictions all substantially limit cable programmers' ability to enter into carriage agreements.

11. Individually and together, the must carry, retransmission consent, public, educational and governmental ("PEG") access and leased access provisions of the 1984 and 1992 Cable Acts threaten especially severe and irreparable injury to Comedy Central, Courtroom Television Network and other recently developed non-premium services in which TWE has an interest. Such services obtain revenues from license fees paid by distributors such as cable operators for the right to exhibit the programming to their subscribers and from fees paid by advertisers who sponsor programs on the service. Because license fees and advertising revenues depend upon the number of persons who are able to view the service, it is crucial to the viability of such a service that it persuade as many operators as possible to offer the service to their subscribers.

12. Since they were launched in April and July 1991, respectively, Comedy Central has attracted approximately 22 million subscribers and Courtroom Television Network has attracted approximately 6.2 million subscribers. Each needs millions of additional subscribers to attain economic viability. By requiring cable operators to devote substantial channel capacity to must-carry broadcast stations, PEG channels and leased access programming, which would otherwise be available to Comedy Central, Courtroom Television Network and/or other non-premium programming services in which TWE has an interest, the Cable Acts deprive such services of vital opportunities to gain additional distribution. In addition, by giving broadcast television stations preferred status both as to coverage and as to channel position, the must-carry provisions will also deprive such services of opportunities to gain additional advertising revenues and divert such revenues to broadcast interests.

13. TWE is a vertically integrated programmer in that it owns both cable systems and programming services. However, many of TWE's principal competitors in the production and distribution of video programming are not vertically integrated. For example, The Disney Channel, the Arts & Entertainment Network, CNBC, ESPN, The Nashville Network, the Playboy Channel and USA Network are all popular programming services owned by companies which, as indicated by publicly available data, do not have any corporate affiliation with any cable operator within the meaning of the Cable Act. *See* Cable Network Ownership Chart, Cable TV Programming (April 30, 1992) (attached hereto as Exhibit B). Such programmers will be able to compete with the program services that TWE owns or in which it or an affiliate has an interest (including Sunshine Network, Black Entertainment Television ("BET"), Turner Broadcasting System (TNT, CNN, Headline News), Comedy Central, Courtroom Television Network (managed by TWCP), the Cinemax Service, the Home Box Office Service, and E! Entertainment Television) free of the challenged restrictions on vertically integrated programmers and will thereby gain competitive advantages over such services.

14. The vertically integrated services provisions of the 1992 Cable Act will irreparably injure TWC (i) by creating uncertainty, pending the conclusion of the FCC rulemaking, as to the extent to which cable operators, including those that do not have any corporate affiliation with TWE, may carry HBO and other TWE services simply because they are offered by a vertically integrated programmer; (ii) once FCC rules are promulgated, by limiting the ability of cable operators to continue to offer, or to add to their line-ups, the programming services offered by HBO and other TWE affiliated program services; (iii) by creating uncertainty, pending the conclusion of the FCC rulemaking, as to the extent to which TWC's cable systems may do business with vertically integrated services (whether or not such services have any corporate affiliation with TWC); and (iv) once FCC rules are promulgated, by limiting the ability of TWC's cable systems to continue offering, or to add to their channel line-ups, services of vertically integrated programmers, including program services of, or affiliated with, TWE.

15. During the interim period between the 1984 Cable Act deregulation and the 1992 Cable Act reregulation, cable operators could offer new programming with the expectation that they could adjust their rates to reflect the cost of that programming if necessary. This expectation resulted in a burst of creation of new programming services. Renewed rate regulation will most certainly chill the creation of new programming services and further investment in existing programming services because the ability of cable operators and programmers to profit from such expressive activities will be determined by the governments' views of what are reasonable profits rather than the open-ended potential rewards of the marketplace. Indeed, in the 1992 Cable Act, Congress seems to have chosen to fulfill its purpose of halting broadcasters' decline in the marketplace by using regulation to cripple their cable competitors' ability to continue to create new programming and new programming formats.

16. The rate regulation provisions will also discourage cable operators from investing in new programming for the same reasons. Since operators face limits in their ability to recoup their investment costs, they will be reluctant to invest in new programming. This reluctance is heightened by the vertical integration provisions, which would subject cable programming services to their restrictions as soon as cable operators invest in them.

/s/ E. Thayer Bigelow
E. THAYER BIGELOW

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF ANN BURR

STATE OF CALIFORNIA,)
) ss:
COUNTY OF SAN DIEGO,)

1. I am President of the San Diego Division of Time Warner Cable, which is an unincorporated division of Time Warner Entertainment Company, L.P. I have held this position for seven years and have been employed by Time Warner Cable or its predecessors for eighteen years.

2. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") have had a far reaching and negative impact on the San Diego Division. Below I detail only a few of these impacts.

3. *First*, the 1992 Cable Act's requirements regarding free previews of premium channels consume considerable time and create significant costs. For example, two of our systems, Southwestern Cable TV and American Cablevision of Coronado, which in combination have 162,000 subscribers, recently notified their subscribers of an upcoming free preview. The notice, which takes the form of a bill insert, has a cost of between .02¢-03¢ per subscriber, depending on the number of other bill inserts included in a given month, or a total of between $3,240.00-$4,860.00

4. *Second*, because the 1992 Cable Act reinstates liability for cablecasting obscene material, we are compelled to prescreen all public access and leased access programming, which we are obligated to carry by the 1984 Cable Act but over which we have almost no control. This prescreening turns us into censors and forces us to make very difficult decisions for which we lack expertise. The programming that the Division itself chooses to cablecast is not of such a nature that we are required to make close judgments regarding obscenity. Prescreening consumes approximately 312 to 520 employee hours per year.

5. *Third*, the must carry provisions will cause particular problems for our systems that currently utilize 100 percent of their channel capacity. To carry the stations required by the must-carry provisions, these systems will be required to delete programming that they currently provide. It has been our experience that programming deletions of any kind cause more subscriber aggravation than any other action, including temporary outages and rate increases.

/s/ Ann Burr
ANN BURR

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM C. CAREY III

STATE OF NORTH CAROLINA,)
) s.s.:
COUNTY OF CUMBERLAND,)

1. I am President of the Fayetteville Division of Time Warner Cable, which is a division of Time Warner Entertainment Company, L.P. I have held this position for over six years and have been employed by Time Warner Cable or its predecessor for thirteen years.

2. If the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") are upheld, they will cause several injuries to the Fayetteville, North Carolina System.

3. HBO presently occupies channel 5 on the Fayetteville system, which has approximately 75,000 subscribers. If the must carry provisions are upheld, we could be required to move WRAL, a Raleigh, North Carolina CBS affiliate, to channel 5. On channel 5 we have a negative trap—a mechanism through which we are able to prevent subscribers from receiving HBO programming if they have not purchased it. It would cost the Fayetteville system approximately $500,000 to move HBO to another channel and make the required technical adjustments.

4. In addition, the Fayetteville system could also be required to carry a Goldsboro, North Carolina station, WYED, for which there is little demand. To carry WYED,

the system would possibly have to drop a satellite delivered programming service, such as the USA Network, CNN, ESPN or Courtroom Television Network, services which we would prefer to carry and believe our customers would prefer to receive.

s/ William C. Carey III
WILLIAM C. CAREY III

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JOSEPH J. COLLINS

STATE OF CONNECTICUT,)
) ss:
COUNTY OF FAIRFIELD,)

Joseph J. Collins, being duly sworn, deposes and states as follows:

1. I am Chairman and Chief Executive Officer of Time Warner Cable ("TWC"), an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE"). I am a Managing Director of TWE, and prior to TWE's formation in the summer of 1992 I was Chairman and Chief Executive Officer of Time Warner Cable Group, an unincorporated division of Time Warner Inc., which directed the operations of American Television and Communications Corporation ("ATC"), of which I was Chairman and Chief Executive Officer, and Warner Cable Communications, Inc. I have been involved in the cable industry for 20 years.

Background of Cable Television

2. The printed word is no longer the only, or even the primary, means of mass communication. The past 50 years have witnessed the development of vast new networks of electronic media for the dissemination of news, information and entertainment via television. In the first wave of the video revolution, broadcast television made possible instantaneous communication between broadcast

television stations distributing their signals from terrestrial transmitting antennas and anyone within the station's transmitting range who owned a television set. In that era, most Americans received no more than three broadcast networks and a handful of independent stations, which provided a choice of only homogenous programming. The programming was developed to suit the broadest cross-section of America. Indeed, a former FCC Chairman termed television in this first wave the "Vast Wasteland".

3. In the second wave of that revolution, cable television systems, which transmit from 12 to more than 150 channels of video programming by means of coaxial and fiber optic cable, have made it possible to communicate a vast array of news, information and entertainment programming to persons within the system's service area who pay a fee to subscribe to cable. Today over 54 million people receive cable television.

4. As part of the cable revolution, a large number of new programming services have been developed. These are typically distributed by means of satellite to cable operators and others, who in turn distribute such programming services to their subscribers. The cable revolution has made possible the development of both general entertainment programming services and more specialized services that present programming on such subjects as news, religion, financial information, government, law, education, music and minority affairs. Individual cable systems also create their own local programming services. For example, TWC's cable systems in the New York City area produce and offer to their subscribers a 24-hour local news service called New York 1.

5. In addition to cable, a number of other technologies, including home satellite dishes, videocassettes, video disks, satellite master antenna television ("SMATV") systems and multichannel multipoint distribution systems ("MMDS"), have been developed. These technologies

compete with both broadcast and cable in communicating news, information and entertainment.

6. The cable industry itself is not "highly concentrated" by any customary economic measure (the ten largest multiple system operators ("MSOs") account for approximately 55% of all cable subscribers), and an effect of the increasing size of larger cable operators has been to enhance their ability to finance new programming ventures and thus increase the number of "media voices" that are available. Since cable television prices were deregulated by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), no fewer than 40 new programming services have been launched, many of them financed in whole or in part by cable operators.

7. Cable operators, including TWC, select which programming sources to include in the array of programming they offer their subscribers. For example, cable operators must choose from among a vast array of programming services devoted to such subjects as news and political developments (C-SPAN I and II, Cable News Network, Consumer News and Business Channel), law (Courtroom Television Network), religion (National Jewish Television, VISN), music (MTV, Video Hits-1, The Nashville Network), minority interests (Black Entertainment Television, Galavision), education (The Discovery Channel, Mind Extension University) sports (ESPN, Sportschannel) and general entertainment programming (USA Networks, WTBS, TNT).

8. In addition, cable operators develop their own distinctive programming for distribution to their subscribers. For example, many of the programming services that characterize contemporary cable communications, including Home Box Office, Showtime, MTV, C-Span, Cable News Network and Headline News, were initially developed or substantially capitalized, in whole or in part, by cable operators, who created or invested in such services to enhance their ability to compete with traditional media

such as broadcast television stations. In addition, individual cable systems create their own distinctive local news programming, as TWC has done with its New York 1 news service in New York City and with its local news services in other locations, including Ithaca and Rochester, New York and other local programming that is produced by many TWC cable systems.

9. Furthermore, many cable operators have produced their own video editorials. For example, TWC's predecessor produced a prize winning series of editorials for telecast on its systems. The series, entitled "American Viewpoints", examined many topical public policy issues. In addition, many TWC systems are very similar to local newspapers, offering national and local weather, local classified advertising, community bulletin boards and television channel listings. Furthermore, many national programming services, such as the Weather Channel and CNN, provide time for local insertions in their programming which TWC and other operators utilize.

Time Warner Entertainment Company, L.P. and Time Warner Cable

10. TWE is a partnership, the majority of which is indirectly owned and fully managed by Time Warner Inc., a publicly traded Delaware corporation. TWE is comprised principally of three unincorporated divisions: TWC, which operates cable television systems; Home Box Office ("HBO"), which operates pay television programming services and which is more thoroughly discussed in the accompanying affidavit of Jeffrey Bewkes; and Warner Bros., which is a major producer of theatrical motion pictures and television programs. Warner Bros. licenses its motion pictures for exhibition in movie theaters, on video cassettes and video disks and by video programmers, including pay-per-view services, premium services, basic services and network and independent television stations. TWE also owns, directly or indirectly, minority interests in various cable television programming services,

which are more throughly discussed in the accompanying affidavit of E. Thayer Bigelow.

11. TWE through TWC and affiliated companies owns and operates cable systems in approximately 1600 franchise areas throughout the United States, which have a total asset value of approximately $8.2 billion, and which reach approximately 6.9 million subscribers. TWE and its predecessors built and acquired these costly assets with the expectation that they, like any other speaker, would have the ability to use their capacities without government interference.

12. TWC's cable systems have channel capacities that generally range from 30 to 70 channels. TWC's cable system in one test area in Queens, New York, which uses advanced fiber optic technology, has the capacity to provide up to 150 channels of programming to its subscribers. With the rapidly expanding technology in the cable industry, TWC anticipates that other systems will be able to achieve similar channel capacity.

13. We believe that one of the developments that may greatly enhance customer satisfaction will be the use of additional channel capacity for multiplexing premium channels and "near video on demand". As more fully explained in the accompanying Affidavit of Jeffrey Bewkes, under multiplexing, premium services are exhibited to subscribers on several different channels, with the same programming scheduled at different times on different channels. This allows, for example, one subscriber to watch a program that starts at 7:00 p.m. on one multiplexed channel, and another subscriber to watch the same program at 8:00 p.m. on a different multiplexed channel. HBO currently offers three multiplex channels and Cinemax offers two. I anticipate that in the future additional multiplexed channels will be offered by other programmers.

14. "Near video on demand" is most easily explained in the context of the Queens system's Quantum programming. Quantum utilizes over fifty channels for pay-per-view movies. Depending on the popularity of the movie, a movie may be offered as often as every 15 minutes on several different channels. We believe this is a much more subscriber-friendly service because it responds to each subscriber's individual schedule. Because of this, Quantum is a prototype for programming that will be presented as other TWC systems' channel capacities increase.

15. TWC and its local divisions exercise editorial discretion in determining which program services should be offered to subscribers. In making such determinations, TWC personnel choose from among the entire array of programming services that are available. They take into account such factors as local tastes; local demographic characteristics, including such variables as age, household size and composition, income levels, occupational characteristics and educational attainments; the quality of programming; the needs and interests of identifiable segments of the local population, including minority and ethnic groups; and the availability of news, information and entertainment to cable subscribers from non-cable sources, including broadcast television stations, movie theaters, cultural and sporting events and non-electronic media. The content of programming services is often decisive in making such determinations. For example, a TWC cable system located in a conservative "middle American" community may choose to offer subscribers a greater array of Christian religious programming, while a TWC system located in an ethnically diverse urban center might place greater emphasis upon program services, including those oriented to persons who speak languages other than English, that would have appeal to large segments of the local population. For example, TWC's cable system in Queens, New York, a community rich in ethnic diversity, offers Greek, Korean and Hindi channels, among others.

16. TWC takes its programming decisions very seriously and exercises the same type of editorial discretion that newspaper editors employ in determining the content of daily newspapers. In addition to individual systems discerning the best way to maximize customer satisfaction, TWC conducted over 60 subscriber preference and satisfaction projects in 1991 and 1992.

17. TWC cable operators continually refine their channel line-ups so as to increase subscriber satisfaction and appeal. Over 55 different program services are carried by at least one TWC cable system; it is estimated that there are no more than three program services that are carried by all TWC cable systems. In fact, the diversity of services offered can be quickly ascertained simply by comparing the channel line-ups of systems across the country. Where a particular program service is carried in all or virtually all TWC systems, it is because that service has demonstrated broad appeal to United States television audiences and is an economically attractive choice.

18. In addition to deciding which services to carry, TWC systems also decide how services are to be "packaged" for subscribers. In most TWC systems, subscribers can choose from among two or more packages or "tiers" of services, for which different prices are charged, and can also elect to purchase premium and pay-per-view services, for which additional charges are made. TWC systems typically offer a "basic" tier of services and an expanded or "standard" tier, which includes a large array of satellite-delivered programming services. Subscribers are usually required to purchase the expanded or "standard" tier in order to purchase premium or pay-per-view services. Premium services are often offered in discounted packages to subscribers who wish to purchase more than one such service. TWC personnel structure and fine-tune such programming tiers and packages based on judgments about local preferences similar to those described above with respect to the choice of individual program services.

19. TWC cable systems also exercise editorial discretion in determining the channel positions on which particular programming will be offered. In determining channel location, TWC personnel consider factors similar to those described above with respect to the choice of individual program service, and weigh those factors with channel accessibility. For a description of channel repositioning in one of TWC's Manhattan systems, see the accompanying Affidavit of Barry Rosenblum.

20. TWC's cable systems compete with a wide variety of alternate sources of news, information and entertainment. In particular, TWC's cable systems compete with broadcast television stations, which, unlike cable systems, offer their programming without direct charges to viewers. Despite this, however, local broadcasting stations achieve a very respectable profit. *See* John C. Severino, *Perspective on Television; No Cable Pie for the Networks' Sky*, L.A. Times, Jan. 27, 1992, B5 ("many local broadcast stations are still making profits in excess of 50 cents on the dollar") (attached hereto as Exhibit A).

21. Although TWC's cable systems compete with broadcast television stations, it is important to note that the cable industry is different from the broadcasting industry. There are no physical limitations on the ability to construct multichannel video distribution systems equivalent to the physical scarcity of the broadcast spectrum.

22. TWC's cable systems also compete with other non-broadcast means of delivering video programming to consumers, including satellite master antenna television ("SMATV") systems, in which apartments in a multiple dwelling unit ("MDU") are connected to a group of antennas capable of receiving satellite-delivered program services that are located on the premises (some SMATV systems use microwave relays to connect multiple MDU's to a single group of satellite receiving antennas); multipoint distribution service ("MDS") or multichannel multipoint distribution service ("MMDS"), often called "wire-

less cable", which deliver one or multiple channels of programming to subscribers by means of terrestrial microwave antennas; home satellite dishes ("TVROs"), which enable their owners to receive a vast array of programming services that are transmitted by satellite, either through a subscription agreement, arranged directly with the programmers or indirectly through any of a large number of program packagers, or, in many instances, free of charge; and video cassettes and video disks, which consumers may rent or buy for viewing on their television sets in conjunction with video cassette players. TWC's cable systems also compete with radio, especially in the provision of music, and with all these media and commercial broadcast television stations for advertising.

23. In addition, TWC's cable systems compete with the traditional print media, especially in the provision of news. Cable television is an electronic publisher which has become a vital, if not primary source for the public of news, opinion, and other information. As of the end of August, 1992, cable passed 95.9% of all homes in the country; 61.7% of these homes, or 54.9 million homes, subscribed. *The Kagan Media Index*, September 28, 1992 at 6-7 (attached hereto as Exhibit B). Cable networks, such as CNN, have assumed great importance to the public in its daily receipt of national and international news. *See, e.g.*, Jay Rosen, *The Whole World is Watching CNN*, 252 The Nation 622 (1991) ("For Americans with cable, CNN serves as a video wire service, offering constant updates on the news. It's also an instant delivery system for dramatic footage from around the globe.") (attached hereto as Exhibit C). CNN's coverage of the Persian Gulf War is a striking example in this regard. Cable also often serves as an immediate source of newsworthy local information. As discussed above, TWC produces local news programs in New York City and Ithaca and Rochester, New York, among other places.

24. One way in which TWC addresses this broad range of competition, is to regularly schedule "free previews" of premium cable services. During such previews, TWC offers a premium cable service for a limited period at no charge to cable subscribers who do not subscribe to that premium service. TWC has found that free previews are an important factor in persuading subscribers to add premium services to their cable package. They are a valuable marketing tool for TWE as both cable system operator and cable programmer because they allow subscribers to actually view, free of charge, the programming they would receive if they subscribed to a particular premium service.

The 1992 and 1984 Cable Acts

25. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") amends the 1984 Cable Act, which had in many respects deregulated the cable industry. In so doing, its reestablishes government regulation that pre-dates the 1984 deregulation. The 1992 Cable Act, however, also goes further. It establishes a broad new regime of federal and local regulation that will, if allowed to stand, destroy the phenomenal development of new programming services. In essence, the second wave of the video revolution could be undone.

The Must Carry Provisions Injure TWE.

26. Implementation of the must carry provisions will cause irreparable injury to TWE in its capacity as a cable operator in at least the following respects:

(a) The provisions will require cable systems of TWC to carry an average of approximately 8 commercial and noncommercial broadcast stations. In fact, as many as 42 systems may have to carry over an estimated 11 broadcast stations. Some of these stations the cable systems certainly do not wish to

carry. For example, in its Canton, Ohio system, TWC may be required to carry a religious broadcast station that it does not currently carry and does not wish to carry. In its Staten Island, New York system, TWC will be required to carry approximately 17 commercial stations, two of which are based in Bridgeport, Connecticut (which is located 70 miles away and has very little, if anything, in common with Staten Island). And, in its Keene, New Hampshire system, TWC will not only be required to add 7 broadcast channels, but to accomplish this, it will also have to purchase and use expensive converter boxes, which it is not now required to use. *See also* Affidavit of Marc J. Apfelbaum ¶¶ 2-15; Affidavit of Jeffrey B. Darrell ("Darrell Aff.") ¶ 3.

(b) Because much of the channel capacity of TWC's cable systems is already in use for other programming services, the must carry provisions will require TWC to displace a substantial number of existing services in favor of commercial and noncommercial broadcast stations that TWC systems would not otherwise carry. *See, e.g.*, Affidavit of Terry O'Connell ("O'Connell Aff.") ¶ 4; Affidavit of Ann Burr ("Burr Aff.") ¶ 5; Affidavit of Stephanie L. Christensen ("Christensen Aff.") ¶¶ 8, 11; Affidavit of Michael J. Rider ¶ 7; Affidavit of Charles William Grinstead ¶ 4. In addition, TWC will be inhibited from offering new, innovative services such as the Cartoon Network, which began operating on October 1, 1992 and Sci-Fi Channel, which began operating on September 24, 1992. TWC's cable service will be made less competitive with other media thereby, and the consumer appeal of and subscriber satisfaction with TWC's cable service will be diminished. Lack of channel capacity presents cable operators with substantial operating problems. Indeed, Paul Kagan Associates, Inc., in a recent solicitation for a publication reviewing cable operator channel capacity problems, termed "the hunt for channel capacity" as "cable's equivalent to the search for the Holy Grail". *See* Exhibit D.

(c) There are no noncommercial educational television stations operating in several of the communities served by TWC cable systems. In each of these communities, TWC will be required to import distant signals from other localities, which could be costly, regardless of whether local subscribers have any interest in receiving such programming and regardless of TWC's judgment concerning the desirability or appeal of such programming.

(d) The must carry provisions will also place TWC cable systems at a disadvantage in competition with other providers of multichannel video programming services that are not constrained by must carry obligations. Under the must carry provisions, TWC will be forced to carry the programming of commercial and noncommercial broadcast television stations regardless of its appeal to or suitability for audiences in the areas served by TWC cable systems, and other, more popular programming will be displaced. Because individual cable systems have a definite number of channels available, these provisions take channels from the cable operators that they could otherwise use in their best editorial judgment. For example, TWC's Staten Island system will be required to carry 17 commercial stations, two of which are based in Bridgeport, Connecticut. But for Section 4 of the 1992 Cable Act, TWC would not provide carriage to these two stations. Competitors such as SMATV and MMDS systems and distributors of programming to owners of home satellite dishes will not be constrained by the must carry provisions. Because viewership of broadcast television programming has steadily eroded in recent years, TWC's cable systems will

be placed at a substantial competitive disadvantage compared to multichannel competitors not bound by those provisions because they will have lost channels that could have provided programming specifically selected for their audiences.

27. The most devastating impact of the must carry provisions, however, is that they empower a broadcast station to single-handedly disturb the programming balance and customer satisfaction in which cable systems invest so many employee and financial resources. A single must carry request can force a system to reconfigure its basic tier, delete customer-favored programming and rearrange its channel lineups. *See* Christensen Aff. ¶¶ 2-15. Each such change can spur hundreds of customer complaints because the customers' "favorite programs" have been moved or deleted.

28. The 1992 Cable Act also empowers commercial broadcast stations to forego must-carry status and instead withhold consent for retransmission of their signals unless the cable operators pay them a fee. I believe stations electing retransmission-consent treatment will withhold their consent unless the cable operator pays them a substantial fee. In addition, it is my opinion that only the most popular, influential and powerful stations will be in a position to elect retransmission-consent treatment. Such stations will attempt to extract substantial payments from cable operators for the right to retransmit their programming.

The Public, Educational and Governmental Access Provisions and Leased Access Provisions Injure TWE.

29. The public, educational and governmental access ("PEG) provisions of the 1984 Cable Act irreparably injure TWC's cable systems by enabling a franchising authority to require those systems to designate channel capacity for such uses without setting any limit on the

number of channels that the authority can so designate and by enabling municipal authorities to require "assurances" that such PEG requirements will be complied with. For example, in Ithaca, New York the franchise authority requires TWC's local system, which has 60 channels, to offer up to 9 PEG channels. *See also* Affidavit of Thomas M. Rutledge ("Rutledge Aff.") ¶ 8 (City of Austin may require as many as 13 PEG channels).

30. The PEG provisions give the franchising authority control over the content of the programs thus exhibited and expressly displace TWC's editorial discretion. Cable systems are placed in the position of carrying programming that they otherwise would not carry. For example, TWC's system in Austin, Texas was provided programming by a public access programmer that combined graphically pornographic scenes, photographs of aborted fetuses and footage of a man shooting himself in the head. TWC's cable system in Indianapolis, Indiana has had to carry on its public access channel "safe sex" programming, which includes sexually graphic descriptions. And TWC's cable system in Cincinnati, Ohio has had to carry on one of its public access channels nude sports programming supplied by a nudist organization. Further, because the PEG provisions enable municipal officials to require TWC to carry governmental channels, they force TWC to carry government speech that TWC may not wish to carry to subscribers who may not wish to receive it, and they enable government officials to displace TWC's chosen messages with their own messages.

31. In addition, by subjecting providers of DBS service to far less stringent PEG requirements than cable operators are subjected to under the 1984 Cable Act, the 1992 Cable Act causes irreparable injury to TWC's cable systems by placing them at a competitive disadvantage by favoring DBS speech over TWC's. TWC is also placed at a competitive disadvantage because neither the 1992

Cable Act, the 1984 Cable Act, nor any other law requires other providers of video programming, including SMATV and MMDS systems and broadcast television stations, to provide PEG channels.

32. The leased access provisions compel TWC to publish the speech of others. These provisions expressly abrogate the editorial discretion of TWC's cable systems and force TWC to be identified with messages it does not wish to convey. Furthermore, the 1992 Cable Act directs the FCC to set the "maximum reasonable rates" that an operator may charge leased access programmers. Thus, TWE is not only compelled to carry leased access, it is limited in the amount it may charge for such access.

33. The provision of Section 10(d) of the 1992 Cable Act, which repeals the immunity from criminal and civil liability with respect to obscene programming carried on PEG and leased access channels that was formerly provided for by Section 638 of the 1984 Cable Act, injures TWC by subjecting it to the risk of criminal and civil liability for programming created by others that it does not wish to carry but is required by law to carry.

34. Section 10(d) requires TWC systems to dedicate valuable employee resources toward making very difficult judgments regarding whether programming is obscene. For example, to evaluate "adult" programming submitted for presentation on leased access channels, Time Warner Cable of New York City ("TWCNYC") has employed two prescreeners to initially screen the programming, who then refer material they believe to be obscene to the channel supervisor or other supervising personnel, who then consult with in-house counsel and outside counsel. This alone is very expensive. Yet, if the decision of TWCNYC's employees, made in consultation with TWCNYC's attorneys, later is judged by prosecutors or others to be wrong, TWCNYC also faces the expense of litigation and possible liability. If TWCNYC believes the

programming is obscene and declines to carry it, federal cable legislation entitles the affected programmer to sue to compel carriage. TWCNYC has already been sued under the 1992 Cable Act for its attempts to exclude obscene programming. *See Goldstein v. Manhattan Cable Television, Inc.*, No. 90 Civ. 4750 (S.D.N.Y. filed Nov. 20, 1992).

35. The provisions of Section 612(h) of the Cable Act permitting TWC to prohibit or restrict obscene programming does not alleviate such injury in that they compel TWC to determine obscenity questions that even Supreme Court Justices regard as exceedingly difficult, and TWC remains exposed to liability if a court later disagrees with its determination. Further, these provisions provide no protection whatever as to obscene programming TWC may be required to carry on PEG channels.

36. In addition, by compelling TWC to yield control of a substantial portion of its channel capacity to unaffiliated programmers, the leased access provisions injure TWC by impairing its ability to offer programming created by others or by itself that it would prefer to carry and that TWC believes its viewers would prefer and by limiting its ability to offer its own programming. *See, e.g.*, Darrell Aff. ¶ 4.

37. By permitting the FCC to regulate the price, terms and conditions of channel leases, the 1992 Cable Act irreparably injures TWC by subjecting it to regulation from which its non-cable competitors are exempt and by placing business control of its communications assets in the hands of government officials.

38. Taken together, the must carry, retransmission consent, PEG and leased access provisions of the challenged legislation injure TWC by requiring it to relinquish editorial and business control of a substantial portion of the cable channels that enable it to communicate. The

average TWC system has approximately 45 channels, is located in an area having approximately 8 local commercial and noncommercial broadcast stations and is required by franchise to provide approximately 2 PEG channels. The Cable Act, therefore, would require TWC to relinquish editorial and business control of over an estimated 30% of its channels (approximately 8 must carry channels, approximately 2 PEG channels and approximately 3.5 leased access channels). This average system with 45 channels must now under the 1992 Cable Act try to serve its subscribers in a responsible way while contending with 10 or so broadcasters dictating where they will be on the system, as well as at least four channels of leased access programmers over whom it has virtually no control and three or more PEG channels with varying programming.

The Free Preview Provisions Injure TWE.

39. The restrictions of Section 15 have already made it more difficult and costly for TWC to offer free previews of premium services. Because Section 15 requires TWC systems to not only notify subscribers who do not subscribe to the premium channel being previewed, but also those who have already requested such channels, TWC systems will incur great expense each time they offer a free preview. For example, each time TWC's San Diego Division sends out a notice, the cost will range from $3,240.00 to $4,860.00. Burr Aff. ¶ 3. In addition, the Division will incur costs for each subscriber that requests a free preview to be blocked. These combined costs are so burdensome that many TWC systems have simply been compelled to discontinue all free previews. *See, e.g.*, Rutledge Aff. ¶ 3; Affidavit of Thomas Sharrard ¶ 2.

40. Section 15, therefore, has significantly inhibited TWC's communications with its subscribers through free previews and I anticipate that premium channel subscriptions will be harmed by this. In addition, Section 15

discriminates against cable operators because it allows non-cable program distributors to promote their premium services without limitation. This places TWC and other cable operators at a competitive disadvantage.

The Exclusive Agreement and Standardized Terms and Conditions Provisions Injure TWE.

41. The exclusive agreement provisions will injure TWC by rendering it difficult or impossible for TWC to obtain exclusive agreements from cable-affiliated programmers, thus impairing TWC's ability to differentiate itself from its competitors. As the Secretary of Commerce and Attorney General have recognized:

> "Requiring programming networks that are commonly owned with cable systems to make their products available to competing distributors could undermine the incentives of cable operators to invest in developing new programming. This would be to the long-term detriment of the American public."

Letter from Barbara Hackman Franklin, Secretary of Commerce and William P. Barr, Attorney General to Congressman Edward J. Markey, at 2 (April 1, 1992) (attached hereto as Exhibit E); *see also* Letter from Robert A. Mosbacher, Secretary of Commerce, and James F. Rill, Assistant Attorney General, Antitrust Division, Department of Justice, to Senator John C. Danforth at 2 (March 13, 1992) (attached hereto as Exhibit F). This is true even if the FCC monitors exclusive agreements through a complaint procedure, as it implies in its Notice of Proposed Rulemaking. No matter how the exclusive license provisions are enforced, they will still hinder TWC from entering into such agreements.

42. These provisions will also impede the creation of new programming services by cable operators, who have historically been among the most important creators of such programming. Any new programming created by

cable operators will, by definition, have attributable cable interests, and therefore be subject to the exclusive license and antidiscrimination provisions of the 1992 Cable Act. I believe that operators will be reluctant to embark on the financial risks of new program service creation when their ability to control the distribution of such services is subject to such intrusive regulation.

The Rate and Content Regulation Provisions Injure TWE.

43. The rate and content regulation provisions discriminate against private cable operators such as TWC simply because they communicate news, information and entertainment by means of cable.

44. The provisions of the 1992 Cable Act that specify the minimum contents of each cable operator's basic tier override TWC's local editorial discretion to determine the contents of the basic tier. These provisions also injure TWC by requiring it to offer basic offerings that it would not otherwise offer and that do not maximize subscriber satisfaction.

45. I believe that under the definition of "effective competition" contained in Section 623(l)(1), the great majority of cable systems in the United States, including those operated by TWC, will be found to lack effective competition. As a result, under Section 623(a)(2), the rates for basic cable service of the great majority of cable systems in the United States, including TWC's, will be subject to rate regulation by local franchising authorities or by the FCC, and the rates for all cable programming services (as defined) offered by such cable systems will be subject to FCC regulation.

46. Neither Section 623 nor any other law purports to prescribe the service offerings or regulate the rates of SMATV systems, MMDS systems, DBS operators, other distributors of programming to home satellite dish owners or cable systems that have "effective competition".

47. The provisions of Section 623(b)(8), which prohibit cable operators from structuring their rates for their premium and pay-per-view services in relation to the non-premium services that a subscriber purchases, also impinge on TWC's editorial discretion because they interfere with TWC's editorial judgment in valuing different forms of speech. Such provisions also place cable operators, including TWC, at a competitive disadvantage as against the non-cable distributors of news, information and entertainment with which they compete.

48. The provisions of the 1992 Cable Act which subject essentially all cable operators to extensive rate regulation for their basic tier and other non-premium service offerings discriminate against cable operators, including TWC, simply because they communicate news, information and entertainment by means of cable. They place TWC at a competitive disadvantage as against the non-cable distributors of news, information and entertainment with which they compete. Such provisions place business control of TWC's communications assets in the hands of government officials.

49. Authorizing local franchise authorities to regulate rates is especially threatening to TWC and other cable operators because franchise authorities are given broad discretion in determining what rates are acceptable for their speech. This broad discretion empowers franchise authorities with jurisdiction over TWC's cable systems to retaliate against systems for political stances and positions that they have taken or may take by lowering the system's rates or refusing to permit needed increases.

50. TWC systems already have endured retaliation from franchise authorities through means other than rate regulation since under the 1984 Cable Act franchise authorities generally had no power to retaliate through rate regulation. For example, Public Cable Company, which serves Portland, Maine and surrounding areas, was

forced to endure a twenty month franchise extension proceeding with its franchise authority, even though the extension was expected to take only six months. The long delay in renewing the franchise is attributable, at least in part, to Public cable's aggressive public campaign against extension of the State sales tax. Darrell Aff. ¶ 2. In fact, one state senator, who represents a district encompassed within the franchise area, threatened retribution against Public Cable. *Id.*

51. In addition, in 1974 the Marion, Indiana franchise authority came very near to revoking the TWC system's franchise because of its programming choices. The system had recently launched the HBO Service, which among other things, offers recently released motion pictures that often portray mature themes. Because of their objection to HBO's content, members of the franchise authority initiated a revocation proceeding to terminate the system's franchise. The system retained its franchise by only a single vote.

52. Furthermore, the recent release of a controversial recording, "Cop Killer" by Ice-T, on a record label owned by an affiliate of TWE resulted in retaliation against TWC by a franchise authority. TWC's Charlotte, North Carolina Division had difficulty obtaining a required transfer approval from the Charlotte City Council due to the displeasure of City Council members with the content of the recording. One City Council member advocated boycotting TWE and urged the Council to vote against the transfer specifically because of his objection to the content of TWE's affiliate's speech. The Council eventually approved transfer of the franchise but there were still council members who voted against approval due to TWE's affiliate's release of Ice-T's recording. *See* Affidavit of Jeffrey B. King. ¶¶ 2-4. TWC's Charlotte Division came very close to having to pay a heavy price for one of its affiliates exercising its guaranteed right to freedom of speech.

53. The discretion that allows this type of retaliation is even more threatening in the context of rate regulation. By giving franchise authorities discretion to regulate, the 1992 Cable Act has given franchise authorities control over the life and death of cable systems. While franchise extensions and transfers occur only infrequently, rate regulation offers a constant opportunity to retaliate against a cable system for its, or any affiliates', controversial speech. Because TWC represents a significant part of TWE's and Time Warner Inc.'s ("TWI") overall business, the rate regulation provisions of the 1992 Cable Act raise the specter of chilling not only TWC's speech but also that of other TWE and TWI divisions, including Time Inc. magazines and Warner Bros. music and movies. With respect to TWC, I believe the threat is particularly clear; since we were almost required to pay a heavy price for the unpopular speech of our affiliate, the price will be even higher if we ourselves, for example, run a hard hitting piece of investigative journalism on one of our local news programs concerning the very same local officials who regulate our rates.

Program Creation, Number of Subscribers, Channel Occupancy, and Exemption of Government-Owned Cable Operators from Franchises and Damages Provisions Injure TWE.

54. By threatening to limit the ability of cable operators, including TWC, to produce and create their own programming, the program creation provisions of the 1992 Cable Act will discourage TWE from creating and disseminating programming that reflects its own distinctive point of view. I believe that cable operators are at present the only multichannel video programming distributors that engage in production and creation of programming to any significant degree. Accordingly, the proposed FCC regulations would, in fact, apply only to program creators affiliated with cable operators. No other program cre-

ators in the United States are subject to such a prospective blanket limitation on their ability to create and produce news, information or entertainment.

55. By threatening to limit the number of subscribers that TWC may serve, the provisions of the 1992 Cable Act directing the FCC to prescribe limits on the number of cable subscribers an operator may serve will prevent TWC from disseminating information to prospective viewers, to its irreparable injury. In addition, those who wish to receive TWC's service will be barred from receiving it.

56. The provision concerning limitations on cable operator size discriminates against cable operators because of the means of communication they have chosen. There are no comparable limitations on the number of persons who may receive or subscribe to newspapers, magazines or other traditional media. Limitations on the number of television stations that can be owned by a given entity have been upheld only because the electromagnetic spectrum over which broadcast television signals are transmitted physically can accommodate only a very limited number of speakers. There are no similar limitations on the number of persons who may communicate by means of cable or other multichannel distribution technologies.

57. Furthermore, the limitation on the number of cable subscribers that TWE may have, like so many other provisions of the 1992 Cable Act, inhibits TWE from developing new programming. Prior to the 1992 Cable Act's passage, TWE was encouraged to invest in new programming because TWE, as a cable operator, was well situated to offer new programming to its broad and expandable customer base. By limiting TWE's customer base, however, the Cable Act also limits the number of subscribers through which TWE may recover its investments in new programming, thereby discouraging TWE from investing in new programming.

58. By limiting the number of channels that can be occupied by a video programmer in which a cable operator has an attributable interest, the 1992 Cable Act interferes with TWC's editorial discretion. It places a limitation on the amount of news information or entertainment that a vertically integrated system may offer. In addition, it discourages TWC and other vertically integrated operators—entities best situated to invest in and develop new programming—from investing in new programming because they will be limited in the amount of such programming that they may carry.

59. TWC currently operates cable systems in at least 10 localities where municipal authorities have expressed an interest in establishing municipally owned cable systems. These localities include St. Petersburg, Florida; Kansas City, Kansas; Schuylkill Haven Borough, Pennsylvania; Somerville, Massachusetts; Belleair Beach, Florida; Haines City, Florida; Plant City, Florida and Orange County, Florida. *See* selected newspaper articles attached hereto as Exhibit G. The provisions of Section 621(f) and 635A will likely encourage other municipalities in which TWC has cable systems to establish such systems. In such localities, the provisions of Sections 621(f) and 635A threaten TWC with injury by subjecting it to regulation by municipal authorities who are competitors and who are exempt from any damages remedy for regulatory misconduct. Such provisions confer upon government officials the power to abuse regulatory authority for purposes of censoring the communications of private cable operators or punishing them for stances they have taken or may take on political issues, including franchising issues. Such provisions also cause irreparable injury to TWC by favoring government officials, and disfavoring private cable operators including TWC, as competitors.

60. As demonstrated above, TWE suffers myriad injuries from the 1992 Cable Act. The overwhelming impact of the 1992 Cable Act is that it radically alters TWE's role in its editorial capacity. Prior to the 1992

Cable Act, TWE based its decision primarily on subscriber satisfaction. The first and most important question asked in making decisions was: Will this directly or eventually increase customer satisfaction? The 1992 Cable Act has altered this. Now the first questions asked are: Does the 1992 Cable Act's provisions allow us to do this? Can we bear the costs and restrictions imposed by the 1992 Cable Act if we do this? The overriding effect of the 1992 Cable Act, therefore, is that it restrains what was cable television's free editorial movement. It restrains creativity, content of programming, breadth of development and presentation of programming.

61. In summary, the must carry, PEG, leased access, free preview restriction, exclusive agreement and standardized terms and conditions, rate and content regulation, limitation on program creation, limitation on the number of cable subscribers, limitation on channel occupancy, and exemption of government-owned cable operators from franchises and damages provisions implement a regulatory structure that in combination discriminate against cable operators in the most harsh and intolerable manner.

/s/ Joseph J. Collins
JOSEPH J. COLLINS

[Notorization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JEFFREY B. DARRELL

STATE OF MAINE,)
) ss:
COUNTY OF CUMBERLAND,)

1. I am Vice-President of the Public Cable Company. Public Cable is an affiliate of Time Warner Cable and serves Portland, Maine and the surrounding area. I have held the position of Vice-President since 1985 and have worked for Public Cable since 1979.

2. Public Cable faces possible injury from the discretion that the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") gives to franchise authorities. Recently Public Cable completed a twenty month franchise extension proceeding with one of its franchise authorities, which had been expected to take only six months. We believe that at least part of the long delay in obtaining the extension was related to Public Cable's aggressive public campaign against application of the State sales tax to cable. As part of this campaign, Public Cable presented on a local access channel a scroll that informed subscribers of relevant government officials' names, their telephone numbers and the manner in which they were voting. This was not well received in many political circles. In fact, one state senator, who represents a district encompassed within the franchise area, threatened retribution against Public Cable.

3. In addition, the must-carry provisions of the 1992 Cable Act will compel Public Cable to carry a station that it would not in its editorial discretion otherwise choose to carry. We anticipate being forced to carry a religious low-power television station, which places an emphasis on proselytizing and fund-raising. Public Cable considers it a violation of its First Amendment rights to be required to offer this station as part of its lineup.

4. Finally, the leased access and Public Educational and Governmental access requirements of the Cable Communications Policy Act of 1984 have significantly hindered Public Cable from producing its own local programming. There is no doubt that the cost of providing, as required by our franchise, (1) connections for live television studios in eleven communities; (2) in excess of $600,000 to purchase equipment for these studios; (3) direct operating support of approximately $50,000 per year for these studios; and (4) other support, including labor at a cost of approximately $25,000 per year, has significantly hindered Public Cable's ability to allocate resources to produce its own local programming.

/s/ Jeffrey B. Darrell
JEFFREY B. DARRELL

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF MICHAEL J. EGAN

COUNTY OF)
) ss:
STATE OF)

I, Michael J. Egan, make this affidavit and state:

1. I am Vice President for Product Development and Programming of Cablevision Industries Corporation ("CVI"), a position I have held since 1986. I submit this affidavit in support of plaintiff National Cable Television Association, Inc.'s Motion for Summary Judgment in Civil Action No. 92-2495.

2. CVI is one of the top ten independent cable television operators in the United States, based on the number of basic subscribers served by CVI's subsidiary, affiliated or managed cable television systems. CVI manages or indirectly owns 63 cable television systems in 18 states, serving a total of 1,157,922 basic subscribers as of December 31, 1992.

3. CVI is a member of the National Cable Television Association, Inc.

4. The particular characteristics of the many CVI cable television systems vary in many ways including the number of homes passed by the system, the number of subscribers to the system, the number of channels of programming provided to subscribers and the number of local commercial broadcast signals and local noncommercial broadcast signals located in the communities served by each system.

5. In addition to the carriage of many local commercial and noncommercial broadcast stations, CVI systems also transmit the programming of some non-local broadcast stations and also offer to subscribers certain cable programming that cannot be received off-air, including programming carried on public, educational and government access channels. In addition, some CVI systems, including the Sullivan County and San Fernando Valley systems mentioned below, provide their own locally originated programming. Locally originated programming on the Sullivan County system includes nightly news programming.

6. Typically the channel capacity of CVI systems is not adequate to permit carriage of all programming made available by broadcast stations, national and regional cable programming networks, and other suppliers. Nor would CVI wish to carry all available programming even if it could do so. Rather, CVI selects the mix of programming that will, in its estimation, provide the best service to its subscribers. Subscriber preferences are given great weight, but CVI's assessments of program quality and diversity also play an important role in programming decisions.

7. CVI seeks to provide high-quality service through channel assignment and program packaging. As with program selection, CVI gives great weight to subscriber preferences when making these decisions, but other factors—including program content—are considered as well.

8. The "must carry" provisions of the 1992 Cable Act will require CVI to carry certain broadcast stations that are not currently offered to subscribers, at the expense of programming that, in CVI's judgment, would be preferable.

9. The Shandaken headend of the Saugerties, NY CVI cable system, for example, offers its 1507 subscribers 35 channels of programming, including 9 channels of off-air broadcast service. There are no vacant or unused channels on the system. The Shandaken system, which is located in Ulster County, is within the bounds of the New York ADI. In addition to the broadcast signals already carried, the new rules will require the addition of two (2) commercial television stations and, most likely, one (1) non-commercial station (carriage obligations for noncommercial stations, which are defined in terms of mileage from the system's headend, will be dictated by final rules interpreting the "principal headend.") The two commercial stations are Spanish language stations located over 50 miles away and the Shandaken community is less than 2% Spanish speaking.

10. The Hunter headend of the Saugerties, NY CVI cable system, is located in Greene County and is within the Albany, New York ADI. The system offers its 1436 subscribers 35 channels of programming, including the signals of 9 off-air broadcast stations. There are no vacant or unused channels on the system. In addition to the broadcast signals already carried, the new rules will require the addition of one (1) more commercial broadcast station.

11. The CVI system in Sullivan County, NY, is located within the New York ADI. The system offers its 15,763 subscribers 38 channels of programming, including 12 off-air broadcast stations. One of those signals is carried on a part-time, shared basis with the Arts & Entertainment Network. Under the new must carry rules the station could claim full-time carriage necessitating deletion of the shared programming. There are no vacant or unused channels on the system. In addition, the new rules will require carriage of one (1) more commercial broadcast station and may also require carriage of one (1) more non-commercial station in addition to converting the part-time carriage mentioned above to full-time (again the actual carriage requirements of non-commercial stations will be dictated by the final rules on "principal headend).

12. The CVI system in San Fernando Valley, CA is located within the Los Angeles ADI. The system offers its 91,531 subscribers 58 channels of programming, including 14 off-air broadcast stations. The system currently reserves two channels for future programming use. CVI has seriously considered using one or both of those channels for carriage of new programming services that have recently become available. Although a number of those new services have been well received by subscribers on other cable systems, it has been CVI's belief that it is important to reserve those remaining two channels for future opportunities. The new must carry rules, however, will impose susbtantial new carriage obligations on this system. One (1) station presently carried on a part-time shared arrangement with the Bravo network could demand full-time carriage. Five (5) additional commercial stations may demand carriage as well as, perhaps, one (1) more non-commercial station (depending, again, upon the ultimate headend designation).

13. Each of the above-mentioned systems will be required, pursuant to the "must carry" provisions of the 1992 Cable Act, to carry certain broadcast stations that are not currently offered to subscribers, at the expense of programming that, in CVI's judgment, would be preferable. In preparing this affidavit I looked at the existing channel line-ups for just 14 of our systems of which these systems not only had new carriage obligations but also inadequate channel capacity to carry those stations. Similar new carriage obligations may also apply to other CVI systems. Operation of this government-enforced preference for carriage of broadcast television stations will reduce the amount and diversity of non-broadcast programming that can be offered by CVI and will, in my judgment, impair CVI's ability to offer its subscribers the highest quality service.

CVI and other cable television operators exercise editorial discretion in determining which programming to offer subscribers, on what terms, and on what channels.

The must-carry provisions of the 1992 Act intrude upon that discretion by requiring operators to give over-the-air television stations preferential treatment in each of these areas.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of February, 1993.

s/ Michael Egan
MICHAEL EGAN
Vice President
Cablevision Industries
Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

SECOND AFFIDAVIT OF DAVID A. GARDNER

STATE OF PENNSYLVANIA)
) ss:
COUNTY OF CUMBERLAND)

David A. Gardner, being first duly sworn, deposes and says:

1. I am an employee of Raystay Co. and have been employed by it or its predecessor companies since 1962.

2. Raystay Co., a Pennsylvania Corporation organized in 1969, and its predecessor companies have operated cable television systems since 1951. It presently operates cable television systems in the communities serving Clinton County, Lycoming County, Cumberland County, Perry County, Franklin County, Pennsylvania; Washington County, Frederick County, Maryland; Berkeley County, West Virginia; Marion County, Mississippi; Gila County, Apache County, and Coconino County, Arizona. Raystay Co. currently provides service to 50,200 basic cable subscribers.

3. In my affidavit dated December 3, 1992, I have described Raystay Co.'s owned and operated cable television systems.

4. Raystay Co. does not own any interest in or holdings in any cable television programmer or network, other than ownership of 128 shares of series D convertible preferred stock in QVC. Thus any notion Raystay Co. favors any particular network based on an economic interest in that network is not accurate.

5. Raystay Co. has an ongoing program of determining customers preferences for the program services it provides on its cable television systems. Some of the methods Raystay Co. uses in determining these preferences are the use of focus groups and the use of written customer surveys. Focus groups are used in the systems on a regular basis to achieve face to face contact with the customers and determine the preferences they have for different types of cable television programs. These focus groups are selected by many different community organizations and municipal bodies to achieve an excellent cross section of customer representation in the groups.

6. Written surveys are prepared in a professional manner taking in to account the latest techniques involved in creating a survey that provides the best information possible in a cable television system. These surveys are done on a regular basis and the results are widely distributed throughout the company. All decision makers involved in the programming decision receive a copy of the survey results as well as the focus group results.

7. Raystay Co. believes that its program decision makers are in a better position to accurately assess customer preferences within its systems than a government imposed mandate that has no input from the local community.

8. During the past five (5) years, Raystay Co. has committed a major portion of its available capital resources, both internally generated and externally borrowed, to expansion of channel capacity. Raystay Co. has borrowed money made available to it by banks and other lending institutions. Lending is limited by the rate at which customer service charges can be increased, which are being severely limited by the Cable Act of 1992.

9. Therefore, it is not a viable option to increase borrowings to further expand channel capacity on the Raystay Co. systems at this time. In order to accommodate additional broadcast stations, due to new must carry obligations, Raystay will be forced to discontinue carriage

of existing satellite delivered services, and to defer the addition of newly created non-broadcast or satellite services.

10. If new must-carry broadcast obligations are required of the Raystay Co. system, Raystay will be forced to drop the carriage of satellite delivered services. The services that we would drop would be the ones most recently added to the Raystay Co. systems. To accommodate the broadcast stations identified in my earlier affidavit, the services we would be forced to drop include: Sci-Fi Channel, C-SPAN, C-SPAN II, Black Entertainment Television, The Cartoon Network, The Discovery Channel, and The Learning Channel.

11. In three of the systems Raystay Co. operates in Pennsylvania that comprise a major portion of Raystay Co.'s basic subscribers, the must-carry rules as they are presently written would require carriage of many stations from outside of Pennsylvania. These stations include ones from Maryland, the District of Columbia, Virginia, and West Virginia. These stations are not "local" in any real sense.

12. In having served these subscribers since 1962, Raystay Co. and its predecessor have an accumulated history of the knowledge of the local viewers interest as regards to broadcast stations. It is the opinion of Raystay's management, having the history of operations from 1962 and the benefits of numerous surveys and attendance at many local community focus groups that there is very little subscriber interest in receiving additional broadcast stations imported from distant markets (distant as defined by local community subscribers preference).

13. In the Raystay Co. systems, the new must-carry rules will displace cable program services that provide diversity of choice to the subscribers with broadcast stations that have not been provided in the past due to lack of interest by the subscribing public. This will lead to a reduction in the diversity of programming available to the

public, and prevents us from providing cable network programming our subscribers want to receive.

This ninth day of February, 1993.

s/ David A. Gardner
DAVID A. GARDNER

Date Feb 9 1993

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Citation Omitted in Printing]

AFFIDAVIT OF JOHN W. GODDARD

STATE OF CALIFORNIA)
) ss:
COUNTY OF ALAMEDA)

John W. Goddard being first duly sworn, deposes and says:

1. I am Senior Vice President of Viacom International Inc. ("Viacom"); President and Chief Executive Officer of the Cable Division of Viacom. I submit this Affidavit in support of plaintiffs' Cross-Motion for Summary Judgment in the captioned action.

2. Viacom is a diversified company whose business segments include, among other things, the ownership and operation of cable television systems serving approximately 1,000,000 subscribers in and around San Francisco, California; scattered communities in Northern California; Seattle and Tacoma, Washington and their environs; Nashville, Tennessee; Dayton, Ohio and Salem, Oregon.

3. Sections 614 and 615 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") require cable systems to allocate up to one-third of their channel capacity for the mandatory carriage of commercial television station signals and allocate a potentially unlimited portion of their channel capacity for the mandatory carriage of non-commercial television station signals. This requirement results directly in reduction of the number of channels which a cable system can use for transmission of non-broadcast signals.

Broadcast stations not currently carried by cable systems can invoke must carry to displace cable program networks that are currently being offered by cable operators, such as Viacom.

4. The potential displacement of existing cable program networks from Viacom's cable systems and foreclosure of potential opportunities for new cable networks or others to speak caused by the new must carry statute is strikingly illustrated by the Viacom systems in Northern California. For example,

(a) The 54-channel Viacom system in San Francisco already carries 11 commercial broadcast stations and 3 noncommercial broadcast stations. The system has no unused channel capacity, yet the must carry provisions of the 1992 Act would require Viacom to add 4 more commercial broadcasters and 2 more noncommercial broadcasters, for a total carriage requirement of 18 broadcasters. This will require the displacement of 4 present speakers.

(b) The 38-channel Viacom system in Marin already carries 14 broadcast stations (10 commercial, 4 noncommercial), equal to the number of basic cable networks being carried. Yet the must carry statute would require up to 3 additional commercial and 1 additional noncommercial station to be carried, displacing 4 cable networks currently reaching audiences in Marin.

(c) A similar situation exists in the 38-channel Viacom system in East Bay. It has no open channels. It already carries 12 broadcast stations (9 commercial, 3 noncommercial). While it has no room for new cable networks, the must carry statute will require East Bay to add up to 6 additional broadcast stations (4 commercial, 2 noncommercial), and potentially therefore require the system to drop half of the

13 basic cable networks East Bay currently carries.

(d) The 37-channel Viacom system in Pinole carries 13 broadcasters (9 commercial, 4 noncommercial). While Pinole currently has 1 open channel, Viacom has undertaken a contractual commitment to its government franchising authority to dedicate use of this channel for the distribution of governmental and civic programming. The must carry statute will require Pinole to add up to 4 additional commercial broadcasters and thus also to displace 4 cable program networks that currently speak on the Pinole system. Attached to this affidavit, as an example of a cable system's carriage line-up, is the current channel card of Viacom's Pinole system.

(e) A similar situation exists in the 37-channel Viacom system in Petaluma, where there is currently one open channel. Although 14 broadcasters are currently being carried (10 commercial, 4 noncommercial), the must carry statute will require Petaluma to carry up to 3 more commercial broadcasters, both preempting use of the open channel and silencing 2 current speakers on the Petaluma system.

5. The situation is not confined to northern California. For example, Viacom is also facing the necessity of displacing cable networks in other areas of the country:

(a) In Viacom's three Puget Sound, Washington systems, Viacom currently has no open channels. Although the 34-channel Puget Sound South system currently carries 9 broadcast stations (7 commercial and 2 noncommercial), it will have to add 2 commercial stations and an additional noncommercial station, displacing 3 current cable network speakers. In Puget Sound

Central, 8 broadcasters are currently carried, but 2 additional commercial and 1 additional noncommercial station will have to be added to the 37-channel system, again displacing 3 cable networks. Two additional commercial stations would be added to the 7 already carried on the 37-channel Puget Sound North system, again displacing two cable networks.

(b) In Dayton, Ohio, Viacom operates a 38-channel system with no open channels. It would have to add 1 additional commercial station, and may have to add 3 Cincinnati noncommercial stations, all within 50 miles of Dayton, which would displace up to 4 cable networks.

(c) The 37-channel Viacom system in Salem, Oregon again has no open channel, but would have to add 2 additional commercial broadcasters to the 6 it now carries, and 1 additional noncommercial station to the 1 it now carries, displacing 3 current cable speakers in Salem.

(d) In Nashville, Tennessee, the 39-channel Viacom system has no open channels. Nashville currently carries 4 commercial broadcast stations and 1 noncommercial station. It would have to add 3 additional commercial stations and may have to add 2 additional noncommercial stations licensed to Bowling Green, Kentucky. Hence, 5 cable speakers could be displaced.

6. Since enactment of the 1992 Act, Viacom already has received must carry and channel positioning requests from five non-commercial broadcasters and one commercial broadcaster. Two separate requests are for carriage in San Francisco; one of the requests is for carriage on 3 different systems. Pursuant to the Standstill Order entered by the Court on December 9, 1992, these requests have not been honored, and one requestor is seeking remedial action by the FCC pursuant to Section 5(j) of the

1992 Act. Copies of the six requests are attached to this affidavit. The requests (and the systems on which carriage is requested) are as follows:

Station	System
KSTC (Tacoma, WA)	Seattle
WPTD (Dayton, OH) *and* WPTO (0xford, OH)	Dayton
KRCB (Cotati, CA)	San Francisco
KCSM (San Mateo, CA)	San Francisco Napa Marin
WHTN (Nashville, TN)	Nashville

At present, none of these stations is carried on the system indicated. However, in addition to its request for new carriage on the San Francisco system, KRCB (Cotati, CA) has filed a separate request to change its channel position in Marin (where it currently is carried).

7. In my view, sections 614 and 615 of the 1992 Act create a preferred class of speakers-—broadcasters with governmentally imposed rights, preferences and guarantees which, in their implementation, directly diminish the rights to speak of the class of non-preferred speakers (such as cable programming networks). It does this without consideration of whether the public even wants to receive any broadcast signals as part of the cable service to which they subscribe in lieu of cable program networks. Some of those speakers who are denied preferred status will lose the ability to be heard by their intended audiences. These disinfranchised speakers must vie with each other for carriage and distribution on a more limited number of available channels than would otherwise be the case in the absence of the requirements imposed by sections 614 and 615 of the 1992 Act.

Because the resulting decreased distribution of cable networks will inevitably lead to decreased revenues for

them, the 1992 Act will inevitably and adversely effect the capacity of this class of non-broadcast speakers to create original programming or to purchase other programming for distribution to subscribers.

I declare under the penalty of perjury that the foregoing is true and correct:

Executed this 12th day of February

s John Goddard
JOHN GODDARD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID HANSON

STATE OF ILLINOIS,)
) ss:
COUNTY OF COOK,)

David Hanson, being duly sworn, deposes and states as follows:

1. I am a Regional Director, Affiliate Operations for Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. I have held this position for one year and have been employed by HBO for over eleven years.

2. Prior to the passage of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), a sales associate and I gave a presentation and proposed an offer to Southwest Missouri Cable Co. regarding Cinemax, one of HBO's premium movie channels. Southwest Missouri Cable was negotiating for its Carthage, Missouri system, which has approximately 4,000 cable subscribers.

3. Following the presentation, Southwest Missouri Cable expressed its interest in and excitement regarding our proposal. It stated, however, due to the impending cable legislation being considered by Congress, it could not make any commitment to dedicating a channel to Cinemax. Furthermore, since the passage of the 1992 Cable Act, Southwest Missouri Cable's System Manager

has informed an HBO Account Service Executive that it cannot now consider adding Cinemax to its channel line-up.

4. In addition, prior to the passage of the 1992 Cable Act, Jones Intercable, Inc. of Carmel, Indiana, which has approximately 12,000 subscribers, provided free previews of HBO to its non-HBO subscribers. Offering such free previews is valuable to both cable systems and HBO because it allows non-HBO subscribers to view HBO's programming without subscribing, thereby sparking interest in its programming.

5. Since the passage of the 1992 Cable Act, however, Jones Intercable of Carmel advised me that it would not participate in the January free previews because of the burdensome nature of the 1992 Cable Act's free preview requirements.

/s/ David Hanson
DAVID HANSON

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DECLARATION OF JOHN HENDRICKS

I, John Hendricks, based on my own personal knowledge declare as follows:

1. I am Chairman and Chief Executive Officer of plaintiff Discovery Communications, Inc., the owner of The Discovery Channel ("TDC") and The Learning Channel, Inc. ("TLC").

2. I make this affidavit in support of plaintiffs' motion for summary judgment.

3. While the operative facts justifying summary judgment are not in dispute, this declaration is submitted to outline the need for immediate review. *See, Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

4. I will set forth the background of the cable industry, the nature of the plaintiffs, the provisions of the 1992 Cable Act as to which summary judgment is sought and generally describe the injury to The Discovery Channel and The Learning Channel. The accompanying affidavit of William Goodwyn demonstrates in greater detail the injury to The Learning Channel.

The Discovery Channel

5. The Discovery Channel was founded in 1985. In the climate of cable deregulation, it flourished. The Discovery Channel has grown to become the fifth largest

cable network with approximately 59 million subscribers, or 96% of the televisions wired for cable.

6. I created The Discovery Channel to reach an audience not adequately served by existing over-the-air stations and cable channels. It is aimed at people who watch television to broaden their understanding and appreciation of the world. The Discovery Channel features nonfiction documentaries about science, nature, technology, human events and history. Among The Discovery Channel's programs are "The Natural World", "Wildlife Chronicles", "In the Company of Whales," "Red Sea," "Russia: Live From The Inside," "Africa Safari: Live," "People of the Forest," and "Ivory Wars." The Discovery Channel also provides a series of programs with The Smithsonian Institution called "Invention", each original episode of which focuses on different inventions. A number of The Discovery Channel's special programs have won Emmys and Ace Awards. See Exhibits B to F of this Declaration for more detail about The Discovery Channel's programming.

7. Each week in "Discovery Journal", The Discovery Channel presents issues of great social and political significance. Among the subjects covered are famine, overpopulation, organ donation, capital punishment and AIDS.

8. The Discovery Channel also includes public affairs programming. For example, because of inadequacies of the over-the-air broadcasters' sound-bite coverage of the Presidential primaries, in February of this year The Discovery Channel provided a block of 20 minutes free time to each of the major Presidential candidates; more than 1.5 million people watched the candidates on The Discovery Channel sponsored forum, Address To The Nation, which was anchored by Walter Cronkite. See Exhibit A of this Declaration.

9. The Discovery Channel competes directly with over-the-air broadcasting, seeking the time and attention of intellectually curious viewers.

10. Discovery Communications acquired The Learning Channel in 1991 as a complementary service to The Discovery Channel. The Learning Channel features educational programs for viewers of all ages. The Learning Channel schedule will soon include six hours of commercial-free preschool educational programming every weekday called "Ready, Set, Learn"; programs such as "The Learning Channel Elementary School" and "Mad Math" for elementary school children; weekly programs such as "Ten Great Writers" for high-school age and other viewers; and adult education programs such as "Learn to Read" which gives adults the opportunity to learn to read in the privacy of their own homes. In September 1991, The Learning Channel premiered "To Read", a The Learning Channel Special Presentation, which celebrates the joy reading brings to our lives. The Learning Channel also has programming for teachers. For example, The Learning Channel's weekly series "Teacher TV" is produced by, for, and about teachers. It profiles innovative teachers who are "breaking the mold" and bringing new kinds of active, involving learning experiences to their students. It addresses the concerns of teachers in a fast-paced, high quality program and has been extremely well received by both parents and teachers. The Learning Channel also provides programming for teachers to tape and use in the classroom.

11. Some of the most watched regular series on The Learning Channel are "Ancient Journeys", "Archeology", "A Traveler's Journal", "The World: A Television History" and "Civilization" and "Science Frontiers." These programs are intended to broaden the viewer's prospective on history, world culture, science, sociology and anthropology. For more detail about The Learning Channel program, see Exhibit G of this Declaration and the accompanying Declaration of William Goodwyn.

The Technologies of Broadcasting and Cable

12. Broadcast television and cable television have wholly different technologies. Broadcasters radiate electromagnetic waves from transmitters. The waves are intercepted by the viewers' television receivers and translated to produce video images. Because of the physical limits of the electromagnetic spectrum, the number of broadcasters in any area at any time is physically limited. Thus, limited regulation and allocation of the airwaves is essential for over-the-air broadcasters.

13. Cable networks, such as The Discovery Channel and The Learning Channel, sell their programs to cable system operators, who retransmit the programs over coaxial and fiber optic cables to subscribers. The Discovery Channel and The Learning Channel also license their services in other alternative technology markets, including the SMATV, MMDS and TVRO markets. The number of channels that can be distributed by cable and the alternate technologies are not limited by the electromagnetic spectrum, although for economic reasons most cable system operators usually carry between 36 and 54 channels.

14. As I will discuss in greater detail in the subsequent paragraphs, the Cable Act of 1992 forces cable system operators to carry additional local over-the-air broadcast stations and to give them preference at the expense of programmers like The Discovery Channel and The Learning Channel. As a result, The Discovery Channel's and The Learning Channel's audience will be artificially limited. In essence, it mandates mediocrity in place of diversity and quality for no good reason.

15. *The Must-Carry Provisions.* Sections 4 and 5 of the 1992 Cable Act require each cable system to carry local commercial over-the-air broadcast stations on as many as one-third of the cable operator's channel capacity, plus low power stations and non-commercial educational stations.

16. Each cable system has a finite number of channels for transmitting programs. The requirement that each cable operator dedicate substantial capacity to over-the-air broadcast programs limits the number of channels available for cable signals. Moreover, cable operators now operating at full capacity will be required to drop cable networks to comply with the must-carry provisions.

17. Cable networks such as The Discovery Channel and The Learning Channel must compete for the remaining available usable channels. Cable networks are therefore necessarily less likely to be carried than the over-the-air broadcast stations, which must be carried. Popular networks, such as The Discovery Channel, will face artificially stiffer competition for the remaining channels. Newer networks, such as The Learning Channel, face exclusion. Prior to the Act, The Learning Channel frequently vied for one of the last available channel positions in a cable system. After the Act, The Learning Channel has experienced greater difficulty as available space has been constricted by the must-carry provisions. Indeed, The Learning Channel has been rejected or threatened with deletion by cable operators to make channel space available for the broadcast signals which must be added pursuant to the must-carry provisions of the Act.

18. The must-carry provisions of the 1992 Cable Act also reduce the audience for The Discovery Channel. While The Discovery Channel is now carried on the basic service tier by most of its cable operator customers, the must-carry provision will cause The Discovery Channel to be moved to higher programming tiers which are targeted at narrower audiences. As a result, The Discovery Channel will lose advertising revenue and have to cut back on its programming efforts, at the same time favored broadcast television channels will have artificially larger audiences. There is no need to favor broadcast television in this respect, since more than 92% of all TV advertising revenue goes to over-the-air broadcast television, while less than 8% goes to cable television.

19. *The Channel Positioning Requirements.* Sections 4(b)(6) and 5(g)(5) of the 1992 Cable Act require each cable operator to retransmit the mandatorily carried over-the-air stations on the channel number on which each such station is currently broadcast, or was broadcast on stated dates, as set forth in the Act.

20. Channel positioning is a significant factor affecting the size of the audience reached. Lower channel numbers, and channels in proximity to other popular channels typically reach larger audiences. Cable networks such as The Discovery Channel with preferable channel positions face displacement to less favorable channel positions by over-the-air broadcast stations. Also, cable audiences associate networks like The Discovery Channel with the channel on which they have traditionally been carried. Cable networks forced to change channels will lose audience recognition. New networks like The Learning Channel will be totally foreclosed from more favorable slots no matter how good the programming.

21. Requiring cable operators to give preference to over-the-air broadcast programmers in making channel assignment invades the editorial judgment of cable operators and denies cable programmers access to positions statutorily granted to over-the-air broadcast stations.

22. There is no justification for Congress' infringement of the rights of cable operators and cable programmers. The justifications offered by Congress in Section 2 of the Act are both inaccurate and inadequate. In particular:

a. Congress purports to find that cable operators and cable programmers have "market power" and are "seriously jeopardiz[ing]" over-the-air broadcasters; in fact, over-the-air broadcasters dominate television. Cable television has grown not because it has "undue market power" but because it has offered more attractive programming.

b. Congress purports to be protecting "local origination of programming." However, local over-the-air

broadcasters do not feature local programming other than news. The bulk of their programming is reruns of sitcoms.

c. Congress purports to be protecting "diversity" of programming. However, diversity in television programming is coming from cable programmers like The Discovery Channel and The Learning Channel, not from the mediocre, lowest-common-denominator fare of broadcast television.

d. Congress states that "more advertising revenues will be reallocated from broadcast to cable television systems" without disclosing that more than 92% of all television advertising revenue goes to over-the-air television broadcasters. See Exhibit H.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on February 12, 1993.

/s/ John Hendricks
JOHN HENDRICKS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

SECOND AFFIDAVIT OF DOUGLAS V. HOLLOWAY

I, Douglas V. Holloway, declare as follows:

1. I am Senior Vice President-Affiliate Relations of USA Networks which owns and operates USA Network and The Sci-Fi Channel. My responsibilities include the sale and distribution of USA Network and The Sci-Fi Channel to cable systems throughout the country. I submit this affidavit in support plaintiffs' cross-motion for summary judgment.

2. The must carry requirements of the 1992 Cable Act already are having a significant adverse effect on the distribution of The Sci-Fi Channel. The Sci-Fi Channel began operations on September 24, 1992. The reaction to the introduction of this new channel has been extremely favorable from cable operators and from cable subscribers. Attached is an article from the February 1, 1993 edition of *Multichannel News* indicating that cable operators named The Sci-Fi Channel most often as the service they planned to add during 1993. Since its introduction, cable operators serving approximately 11 million homes have launched The Sci-Fi Channel.

3. Despite receiving such high praise for The Sci-Fi Channel, cable operators serving approximately 50 million homes have not added The Sci-Fi Channel in their systems. The reasons most frequently given by these cable operators are that their particular systems do not have a sufficient number of channels available to enable it to

add this new service. Many cable operators have added that their channel capacity problems have been exacerbated by concerns arising out of the must-carry provisions of the 1992 Cable Act. As a result, despite the fact that many of their subscribers have requested the addition of The Sci-Fi Channel, these cable operators will not be able to introduce The Sci-Fi Channel until their obligations with respect to the must-carry provisions of the Cable Act are better defined.

4. As a basic service, The Sci-Fi Channel relies on two sources of revenues—subscriber fees and advertising revenues. Each such source of revenue is directly dependent on distribution, and the distribution of the channel is directly affected by the uncertainty surrounding the 1992 Cable Act. USA Networks continues to suffer as a result thereof.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 10 day of February, 1993.

/s/ Douglas V. Holloway

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF MATTHEW B. KASMAN

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

Matthew B. Kasman, being duly sworn, deposes and states as follows:

1. I am Vice President, Affiliate Operations for Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. I have been employed by HBO for over 10 years and am very familiar with the cable programming distribution industry.

2. Prior to the passage of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), HBO had launched a sales initiative for "multiplexing" HBO and Cinemax, two of the cable programming services that HBO offers. Under multiplexing, HBO and Cinemax are presented to subscribers on two or three channels using time differentiated scheduling so that different programming from the service appears at the same time on various channels. This is an important programming service because it (a) increases programming options for subscribers; (b) helps HBO and Cinemax to match the television viewing schedules of various subscribers; and (c) makes subscribers more receptive to HBO and Cinemax programming. Under HBO's multiplexing approach, cable systems have the option of dedicating up to three channels to HBO pro-

gramming and up to two channels to Cinemax programming. Multiplexed services are normally offered at no additional cost to the subscriber, thereby enabling HBO to better compete with other sources of programming.

3. Prior to the passage of the 1992 Cable Act, HBO was discussing with TKR Cable Co., a multiple system operator ("MSO"), multiplexing for its cable system in Nanuet, New York. The Nanuet system has approximately 45,000 cable subscribers, 25,000 HBO subscribers and 7,000 Cinemax subscribers. The system was considering dedicating two additional channels for HBO multiplexing.

4. Since the passage of the 1992 Cable Act, however, TKR has informed HBO that it will not engage in any negotiations regarding multiplexing until the constitutionality of the must-carry regime is decided. It also informed HBO that if the must-carry provisions of the Act are upheld, the Nanuet system would not have room for any channels for multiplexing HBO programming.

5. Another MSO that HBO was negotiating with prior to the passage of the 1992 Cable Act was MultiVision Cable TV Corp. MultiVision was discussing multiplexing for its cable systems in Anaheim and Hermosa Beach, California. The Anaheim system has approximately 37,600 cable subscribers, 10,800 HBO subscribers, and 2,600 Cinemax subscribers. The Hermosa Beach system has approximately 18,000 cable subscribers, 5,600 HBO subscribers, and 1,000 Cinemax subscribers. Both the Anaheim and Hermosa Beach systems were considering dedicating additional channels for HBO or Cinemax multiplexing. In addition, the Anaheim system was considering dedicating an additional channel to "Selecciones", an HBO service that provides programming in Spanish.

6. Since the passage of the 1992 Cable Act, however, MultiVision has informed HBO that it will not engage in any negotiations regarding multiplexing or "Selecciones" until the constitutionality of the must-carry provisions are decided. MultiVision has also informed HBO that if the must-carry provisions are upheld, Anaheim and Hermosa Beach will have to reevaluate their channel capacity for multiplexing HBO or adding "Selecciones" on a dedicated channel, and may not have the capacity to do either.

7. Also affected by the 1992 Cable Act's provisions is programing that HBO offers free of charge to non-HBO subscribers. Prior to the passage of the 1992 Cable Act, HBO could offer, without governmental restriction, programming of public interest to all cable subscribers, whether or not they subscribed to HBO or Cinemax.

8. Since the passage of the 1992 Cable Act, however, cable systems have begun to refuse to offer this type of public interest programming to non-HBO subscribers because they believe that doing so may violate Section 15 of the 1992 Cable Act. (HBO does at times offer movies rated R by the Motion Picture Association of America and therefore, even though a given "preview" of the HBO service to non-HBO subscribers may not include movies rated R, is subject to Section 15.)

9. On January 17, 1993, HBO offered free of charge to non-HBO subscribers, and in the spirit of the presidential inaugural celebration, "An American Reunion: The People's Inaugural Celebration", programming that contained excerpts from the inaugural events. Cablevision Systems Corporation ("CSC"), which has approximately 1,662,000 cable subscribers, 863,000 of which are HBO subscribers and 318,000 of which are Cinemax subscribers, however, initially refused to offer "An American Reunion" to non-HBO subscribers. CSC believed that offering this programming would possibly violate Section 15. Therefore, CSC agreed to present "An American Reunion" to non-HBO subscribers only after HBO provided CSC with an indemnification for any damages that might be imposed for a violation of Section 15. *See* Exhibit A.

10. As part of the inaugural celebration, Disney also offered free of charge to non-Disney subscribers programming that contained excerpts from the inaugural celebration. Paradoxically, Disney was able to offer this programming, which was very similar to HBO's, without restriction because Section 15's terms do not apply to Disney since it is not a premium channel that "offers movies rated by the Motion Picture Association of America as X, NC-17, or R".

/s/ Matthew B. Kasman
MATTHEW B. KASMAN

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF LISA A. KERR

Lisa A. Kerr makes this affidavit and states:

1. I am the Senior Director of Affiliate Relations of National Cable Satellite Corporation, d b a C-SPAN ("NCSC") with overall responsibility for the relationships between NCSC and its cable television system affiliates of C-SPAN and C-SPAN 2, the two public affairs programming services operated by NCSC.

Background

2. C-SPAN and C-SPAN 2 are available on a 24-hour per day basis via cable television and are devoted entirely to information and public affairs programming, including the live gavel-to-gavel coverage of the proceedings of both the U.S. House of Representatives (on C-SPAN) and the U.S. Senate (on C-SPAN 2), and a variety of other events at public forums around the country and the world. Each event on C-SPAN and C-SPAN 2 is provided to the viewer without editorial comment or analysis, and whenever possible, on a live basis. With our 24-hour capacity on two networks, we are also able to deliver the viewer coverage of each event in its entirety.

5. The C-SPAN network is available to 58 million cable television subscribers, representing 62% of all television households in the U.S. The C-SPAN 2 network is available to 29 million cable television subscribers, representing 31% of all television households in the U.S. To-

gether our two networks have attracted a significant and involved audience, and have drawn comment from our colleagues in the news and information business (see the brochure, attached as Exhibit A).

NCSC as a First Amendment Speaker

6. By exercising a significant amount of editorial discretion regarding the types of programming offered by C-SPAN and C-SPAN 2, the NCSC staff is engaged in conduct protected by the First Amendment. Given that status, NCSC is strongly opposed to the aptly-named "must carry" rules that are contained in the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"), and the constitutionality of which is the subject of this proceeding. NCSC believes the must carry rules, as set out in Sections 4 and 5 of the Cable Act, clearly violate NCSC's free speech rights as guaranteed by the First Amendment. The rules grant an inappropriate government-sanctioned preference to broadcast licensees over all cable programmers such as C-SPAN and C-SPAN 2. As such, they also have the practical and intolerable effect of actually reducing NCSC's access to its audience.

The Must Carry Rules "Block" C-SPAN's Access to Its Audience

6. It is my opinion, based on our experience in seeking cable system carriage for C-SPAN and C-SPAN 2, that the must carry rules (when they were on the books) and the threat that the rules will be reimposed have meant less carriage for our services in the past, and will mean the same in the future. The result has been and will be that many cable television subscribers who might otherwise be able to watch their government in action on their cable systems, are denied the opportunity. Although C-SPAN (and to a greater extent C-SPAN 2) has faced scores of such cable system access problems related to the

must carry rules, the following few situations illustrate the problem very well.

Systems Where the Rules "Block" C-SPAN's Access to its Audience, or Put It at Risk

7. For example, throughout the Eighties, we were told by the manager of the cable system in Walnut Creek, California that he could not carry C-SPAN on his system on a full-time basis because the must carry rules forced him to dedicate too many channels to local, and frequently similarly-programmed broadcast stations. His solution was to force C-SPAN to share a channel with another service. The proof of the "blocking" effect of the rules on C-SPAN carriage was that as soon as one of the broadcast stations with must carry status simply stopped operating, the manager immediately placed C-SPAN on the system on a full-time basis.

8. The situation in San Mateo, California is similar, except that even today, after 14 years of trying to get C-SPAN its own channel on that system, we are still part-time there. It was made clear to us by every system manager or marketing manager there since 1979 that if it were not for the must carry rules, C-SPAN would have had its own channel, a long time ago.

9. Now, as many cable operators believe the must carry rules will soon become law again, our marketing representatives are being told to expect that C-SPAN and C-SPAN 2 will be dropped from their channel lineups. Just last month, for example, the executive vice president of Simmons Cable expressed his concern to us that the must carry rules may hurt C-SPAN's current and future carriage on the Simmons systems, which serve more than 180,000 subscribers. Today, C-SPAN is seen by 83% of the Simmons subscriber base. After the new rules are applied, C-SPAN will likely be seen by fewer Simmons Cable subscribers, but the size of the audience we will lose is uncertain at this time.

10. The same problem exists for us in New York City. On January 6 of this year we met with the management of the cable systems in New York to discuss the rebuild plans for one of the Manhattan systems. We were pleased to know that both our services are scheduled to be carried full-time when the rebuild of the system is complete. However, our sales representative was told that because the new must carry rules could require the carriage of local broadcast signals that are not now in the proposed 76 channel line up, the system would be forced to drop some services. We are concerned that C-SPAN 2 would be a cable service vulnerable to being dropped.

11. Just last week we talked to the general manager of the Intermedia Partners-owned system in Santa Clara, California about finally getting at least our primary service, C-SPAN, carried to its 20,000 subscribers who now are unable to see it. The San Francisco-area system has 28 channels of capacity, 16 of which are taken up with local broadcast stations. The general manager pointed out that given the number of local stations in the San Francisco Bay area that would qualify for must carry status under the proposed Cable Act, it would be highly unlikely that he would be able to carry C-SPAN, much less C-SPAN 2, in the future unless he completely rebuilds the system.

12. In response to the passage of the Cable Act, we took care this week to review the carriage status of C-SPAN and C-SPAN 2 for the Viacom Cable-owned systems in the San Francisco Bay area. Given the large number of broadcast stations in that market that would certainly qualify for must carry status, many cable programming services will likely be dropped to accommodate them. C-SPAN and C-SPAN 2 are particularly vulnerable. For example, in the fully programmed 54-channel San Francisco system, C-SPAN 2 must currently share a channel with one of three PBS stations carried on the system, KMTP-TV. Since the Cable Act became law, the system has received demands for carriage by two other

PBS affiliates, KCSM-TV and KRCB-TV. The effect, of course, is that the system will have to drop two cable services to accommodate them. Moreover, it is probably only a matter of time before KMTP-TV, the station that shares a channel with C-SPAN 2, submits its demand for full-time carriage. The effect, of course, is that C-SPAN 2 will lose its channel, and may not find another.

13. Viacom's East Bay system carries just C-SPAN, and even so we share a channel with the same PBS affiliate, KMTP-TV, with which C-SPAN 2 shares a channel in the San Francisco system. All of the East Bay system's 38 channels are full. If the must carry rules are applied, the system could be required to drop as many as 7 non-broadcast services to accommodate the additions. Again, our service, C-SPAN, is at risk of losing access to our audience.

14. The Marin County system has 37 channels, all of which are fully programmed with 14 local commercial and educational broadcast stations. Fortunately, C-SPAN is carried on a full-time basis as of today. Unfortunately, the must carry rules would require that 4 additional channels be found for those broadcast stations that qualify for carriage. Short of a rebuild of the system, we believe that C-SPAN would be at risk of losing carriage on the Marin system, and the likelihood of adding C-SPAN 2 in the future is made even more remote.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of February, 1993

/s/ Lisa A. Kerr
Lisa A. Kerr

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF GREGORY L. KLEIN

DISTRICT OF COLUMBIA ss:

GREGORY L. KLEIN makes this affidavit and states:

1. Since January 1986, I have held the position of Director of Economic Analysis at the National Cable Television Association, Inc. (NCTA). I submit this affidavit in support of plaintiff National Cable Television Association, Inc.'s Motion for Summary Judgment in Civil Action No. 92-2495.

2. I hold a Masters degree in Engineering Economics from Indiana State University in Terre Haute, Indiana and a Masters degree in Economics from Boston College in Chestnut Hill, Massachusetts. I am responsible for collecting, tabulating, and analyzing information that bears on NCTA's positions before Congress and the Federal Communications Commission. I have testified as an expert witness before the Copyright Royalty Tribunal.

3. The information contained in this affidavit is based on personal knowledge as well as on information found in reports and other professional publications that are generally relied on by experts in the field of cable programming and operations.

4. NCTA is the principal trade association of the cable television industry in the United States. NCTA represents owners and operators of cable systems serving over 80 percent of the nation's 57.2 million cable households, as well as more than 60 national and regional cable programming networks.

5. Television signals are electromagnetic impuses that are transmitted to viewers' television receivers, where they are translated to produce video images and sound. The primary difference between broadcast technology and cable technology is the medium through which these electromagnetic impulses travel. Broadcast transmissions travel through the air in various frequencies, with the sum of all available frequencies being the frequency "spectrum." This spectrum is physically limited, and can bear only a certain number of television signals. Cable television, by contrast, transmits electromagnetic impulses to viewers through metal wires such as coaxial cable, with different signals traveling at different frequencies inside the cable. In effect, the cable acts as a self-contained electromagnetic spectrum: this allows cable television operators to transmit signals without regard to the specific spectrum limitations that govern broadcast television. As I explain below, however, the carriage capacity of cable television is limited.

6. The number of programming sources available to cable television operators has risen sharply as the number of subscribers to cable service has increased. In 1976, there were 4 national cable programming networks. Currently, 80 national and 48 regional cable networks offer programming and 14 more networks are planned. Cable programming not available through broadcast television includes satellite-delivered networks specializing in quality children's programming, black entertainment programming, artistic programming, science and nature documentaries, sports, news, and public affairs, including coverage of the United States Congress.

7. All cable television systems have a defined channel capacity. As of April 1, 1992, 88 percent of all U.S. systems for which capacity data was available had a maximum capacity of less than 54 channels. Twenty-six percent had a capacity of less than 30 channels. The average cable system currently has a capacity of approximately 40 channels.

8. According to the A. C. Nielsen Company's Cable On-Line Data Exchange (CODE), an industry database, about 2,000 cable systems, serving one-third of all cable subscribers, have no excess channel capacity available for use.

9. Upgrading or rebuilding cable systems to increase channel capacity requires large capital investments—generally in the millions of dollars for any particular local system. Paul Kagan Associates, Inc. estimates that the cable television industry spent $595 million on rebuilding cable systems in 1992, at an average cost of $25,000 per mile. Another $240 million was spent on upgrading cable systems, at an average cost of $7,500 per mile. These costs are not expected to fall; rather, Paul Kagan Associates predicts that the average cost of rebuilding a cable system will increase to $29,000 per mile by the year 2000, while the average cost of upgrading a system will rise to $10,300 per mile. To give a specific example of the expense involved, Continental Cablevision recently agreed as part of franchise renewal to upgrade its 7,600-subscriber Watertown, Massachusetts system from 52 to 61 channels, at a cost of more than $3 million. Brown, *Watertown Win*, Broadcasting, March 30, 1992, at 89. Although emerging technologies such as video compression may provide new ways of expanding capacity, these technologies, too, promise to be expensive.

10. Considering existing channel capacity and the cost of adding new channels, as well as the continuing development of new source of programming, it is clear that, for the foreseeable future, the supply of programming available to cable television operators will exceed the carriage capacity of all but a handful of local cable systems.

11. In the future, emerging technologies such as high definition television (HDTV) and interactive programming, as well as innovative services like the presentation of films at staggered starting times on different channels, will compete with traditional sources of programming for available channel capacity.

12. In the course of my work at NCTA, I have had occasion to review most if not all publicly available research regarding carriage of local broadcast television signals by cable television operators. The most comprehensive study of the incidence of broadcast system carriage was conducted by NCTA and Price Waterhouse during the summer of 1988. This investigation showed that the 3,966 responding cable television systems were carrying 98 percent of all broadcast stations that would have qualified for a carriage preference under the interim must-carry rules invalidated in *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). Ninety-four percent of these systems reported carrying all stations qualified for must-carry status under the interim rules, and an additional 3 percent carried enough qualified stations to satisfy their carriage obligations under the rules struck down in the *Century* decision.

13. Cable television systems in the United States increased their carriage of local broadcast stations during the late 1980s. In 1990, the average cable system carried 8.57 local broadcast signals, 7 percent more than in 1985.

14. According to the *Television & Cable Factbook* compiled by Warren Publishing, the number of operational, commercial broadcast television stations in the United States rose from 919 in 1986 to an all-time high of 1118 in 1992. The number of operational, noncommercial educational broadcast television stations in the United States rose from 316 in 1986 to 363 in 1992, a 15 percent increase. As with commercial stations, more educational television stations than ever before were broadcasting in 1992. Warren Publishing, *Television & Cable Factbook*, Services Vol. 60 at G-3 (1992).

15. Warren Publishing's *Television & Cable Factbook* (Stations Volumes) shows that as of October 1991, broadcast television stations were licensed in 594 U.S. cities, 80 more cities than in August of 1985. This represents an increase of about 16 percent in the number of cities hosting broadcast stations during these years.

16. Cable television (including the broadcast programming it carries) serves about 61 percent of all U.S. households with television. Competing technologies (such as MMDS, SMATV, and TVRO) provide service to approximately 4 percent of television homes, while 35 percent of all television households receive *only* broadcast service.

17. Both independent and public broadcasting stations have claimed a relatively constant share of all television viewing over the last 6 years: they recorded about a 20 share and 3 share, respectively. The top 3 commercial broadcast networks experienced a decline in their share of viewing from a 66 share during the 1985/86 season to a 54 share during the 1991/92 season, but they remain the most-watched programming on television. Combined, broadcast television accounted for more than 70 percent of all television viewing during the 1991/92 season.

18. Figures provided by the Newspaper Association of America indicate that although daily newspapers are published in over 1500 American cities, only 34 of those cities (or approximately 2 percent) are served by two or more competing dailies. The Senate Committee on Commerce, Science, and Transportation found that, as of 1991, there were 53 communities in which two or more cable systems served the same geographic area. S. Rep. No. 92, 102d Cong., 1st Sess. 13 (1991).

19. In 1980, 55 percent of homes passed by cable television actually subscribed. Sixty-two percent of homes passed by cable currently subscribe.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of February, 1993.

/s/ Gregory L. Klein
GREGORY L. KLEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DANA A. MICHAELIS

I, Dana A. Michaelis, declare as follows:

1. I am Vice President, Affiliate Sales, of The Travel Channel, Inc. I have held this position since July 1992. In this capacity I am responsible for the distribution of The Travel Channel to cable systems throughout the country. Prior to serving in this position I was, Vice President, Special Projects, Sales/Marketing, for The Weather Channel, Inc. A summary of the history and programming of The Travel Channel is contained in the affidavit of E. Roger Williams, previously submitted in connection with this action. I submit this affidavit in support plaintiffs' cross-motion for summary judgment.

2. The must carry requirements of the 1992 Cable Act already are having a significant adverse affect on The Travel Channel. Attached hereto is a chart, several pages in length, which I have prepared describing cable systems which have in fact already dropped The Travel Channel because of the must carry requirements, which have informed us they will not be able to add The Travel Channel to their line-ups because of must carry, and which have informed us that they may have to drop our programming in the near future because of must carry obligations.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 9th day of February, 1993.

/s/ Dana A. Michaelis
DANA A. MICHAELIS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF TERRY O'CONNELL

STATE OF MASSACHUSETTS,)
) ss:
COUNTY OF MIDDLESEX,)

Terry O'Connell, being duly sworn, deposes and states as follows:

1. I am President of the Greater Boston Division of Time Warner Cable, which is an unincorporated division of Time Warner Entertainment Company, L.P. I have held this position since January of 1991 and have worked for Time Warner Cable or its predecessor since May of 1982.

2. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") have caused several injuries to the Greater Boston Division cable systems. Below I outline only a few of these injuries.

3. Because the 1992 Cable Act reinstates liability for cablecasting obscene material, the Division has been compelled to prescreen the Lynn, Massachusetts Cable Group's public access programming for such material. The Division's Access Supervisor prescreens programming for a total of approximately 250 hours per year.

4. In addition, if the must carry provisions of the 1992 Cable Act are upheld, the basic tiers of cable systems

throughout the Greater Boston Division will have to be expanded. Depending on the system, the basic tier will have to be expanded by three or four channels. This expansion of the basic tiers will force a reduction of the number of services offered on most systems' expanded and standard tiers. We anticipate that possibly three channels will have to be dropped from most systems' line-ups. Unfortunately, we would be compelled to drop some of our more popular services, such as the satellite delivered Superstations from Chicago, Atlanta and New York.

5. Furthermore, the provisions of the 1992 Cable Act that authorize franchise authorities to require funding for Public, Educational and Governmental ("PEG") programming place significant financial burdens on cable systems. The Greater Boston Division has already been required by franchise agreements to commit millions of dollars to PEG programming. Below is a table which shows the total dollar amount spent by our cable systems over the terms of their franchises, which range from ten to fifteen years.

PEG Expenditures over Life of Franchise

Municipality	PEG Operating Cost	Facility/ Equipment Cost	Maintenance Hours Required
Somerville	$ 4,485,000.0	$ 700,000.0	0
Medford	1,621,000.0	825,000.0	0
Salem	1,950,000.0	400,000.0	0
Melrose	1,482,500.0	225,000.0	0
Everett	500,000.0	185,000.0	120 hrs.
Chelsea	626,000.0	215,000.0	120 hrs.
Lynn	1,500,000.0	390,000.0	no limit
Malden	1,700,000.0	310,000.0	120 hrs.
Swampscott	615,000.0	175,000.0	no limit
Wakefield	1,950,000.0	523,000.0	0
Winthrop	1,200,000.0	200,000.0	0
	$17,629,500.0	$4,148,000.0	

/s/ Terry O'Connell
TERRY O'CONNELL

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition of Intervenor-Defendant Applicant National Association of Broadcasters to Motions for a Preliminary Injunction Restraining Enforcement of Sections 4 and 6 of the 1992 Cable Act Filed by Plaintiffs TWE, NCTA and Discovery in these cases. This affidavit supplements the information in my earlier affidavit submitted November 22, 1992, in *Turner Broadcasting System* v. *FCC*, Civ. Action No. 92-2247 (SFW, TPJ, SS), and describes recent developments in fiber optics, video compression, and digital video servers for cable television.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen &

Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity in cable systems. However, the channel capacity of cable television systems is being rapidly expanded by cable television companies. The increasing deployment of fiber optics and the use of video compression techniques will expand significantly the number of channels of capacity available to all cable customers, eliminating any shortage of channel capacity for desirable programming. Perhaps more importantly, however, the development of cost-effective video switching devices to provide video-on-demand completely removes any ceiling or limits on the availability of video programs through cable systems. Video switches shift the program-delivery limitations of cable television systems from the channel-carrying capacity of the systems to the unlimited capacity to store programs in each system's video library. Video switching technology is being depioyed not only by cable television systems, but also by telephone companies offering to provide so-called video dial-tone services.

Fiber Optics

4. Recent developments confirm that fiber optics is becoming increasingly prevalent in cable television systems. There are more than 1 million miles of fiber-optic cable in cable systems throughout the U.S. and another 620,000 miles is expected to be installed this year.[1] In fact, the Myers Reports survey of 834 cable system operators reported that 38% of systems with 12-36 channels, and 40.6% of systems with 37 or more channels, plan

[1] Kathy Berlin, *Fiber Deployment '93: 85 Miles an Hour, Every Day*, Cable World, January 18, 1993, at 32.

to install fiber optic technology.[2] Overall, 3 out of 4 cable operators are making plans to expand channel capacity.[3]

5. For example, Time Warner has announced that it plans to upgrade its U.S. cable systems, serving 6.8 million subscribers, to fiber.[4] Likewise, Tele-Communications, Inc. (TCI) plans to provide fiber to 90% of its subscribers over the next 4 years.[5] TCI's Barry Marshall estimates that the use of fiber in multiple system operators' (MSO's) cable trunks will expand from its present percentage of 20% to as much as 40% by the end of 1993[6]

6. Technology and cost improvements continue to drive the use of fiber. For example, Jerrold has advertised that its STARFIRE 750 fiber optic laser system can provide 60 analog, or 500 digitally compressed, TV channels on a single fiber. Thus the technology is now in place to expand cable channel capacity to 500 or more channels and cable operators are beginning to implement it.

Video Compression

7. Video compression is the technology that is "launching the era of 500-channel cable systems."[7] In the past three months, major cable MSOs (Multiple System Operators) have announced plans for systems which will deliver digitally compressed cable television signals into viewers' homes by 1994. This will dramatically multiply the number of signals which can be carried on *existing* cable systems without the need to replace the cable lines.

[2] Rich Brown, *Operators Plan Growth Along Fiber Lines*, Broadcasting, February 1, 1993, at 29.

[3] *Id.*

[4] Carl Weinschenk, *Time Warner's Billion-Dollar Fiber Plan*, Cable World, December 14, 1992, at 44.

[5] *TCI Boosts Spending*, TV Digest, January 18, 1993, at 4.

[6] *Id.*

[7] Carl Weinschenk, *Compression Kickstart*, Cable World, December 9, 1992, at 1.

8. On December 2, 1992, TCI announced that it had agreed to purchase up to 1 million home set-top terminals for receiving compressed digital video signals.[8] TCI, which operates 443 local cable systems, expects to begin installing the technology in late 1993 or 1994 and expects compression to be available to as many as 95% of its systems by 1995.[9] It will offer compressed digital video to 1 million of its 9.2 million customers beginning this year.[10] As a spokesman for Time Warner noted, the TCI venture "absolutely accelerates compression into the here and now." [11]

9. Initially, TCI plans to convert six or seven analog channels to digital, yielding a total of 60-70 new channels.[12] Eventually, a 50-channel system will be able to offer 500 channels with this compression technology. TCI expects the near term cost of implementing digital compression to be "de minimis," in part because existing analog set-top converters can be upgraded and reused for roughly $80 each.[13]

10. On January 26, 1993, Time Warner announced its own digital compression plans.[14] Time Warner announced that it will use digital compression to provide hundreds of channels to its customers as part of its "Full

[8] Peter Lambert, *TCI: $200 Million for Channel Explosion*, Broadcasting, December 7, 1992, at 4, 15.

[9] Geoffrey Foisie, *TCI Sees Compression Paying For Itself*, Broadcasting, December 21, 1992, at 31.

[10] Kevin Maney, *Technology to Expand Cable TV Services*, USA Today, December 3, 1992, at B1.

[11] Lambert, *supra* at 4.

[12] Carl Weinschenk, *Compression Kickstart*, Cable World, December 7, 1992, at 1. *See also* Edmund L. Andrews, *Cable Concern Plans to Offer 500 Channels*, N.Y. Times, December 3, 1992, at A1.

[13] Foisie, *supra*.

[14] Geraldine Fabrikant, *Time Warner Plans Cable System of Hundreds of Channels*, N.Y. Times, January 28, 1993, at D15.

Service Network" serving residential cable subscribers in Orlando, Florida by 1994.[15] Time Warner emphasized that the Orlando system is not a test and that it is "completely committed to putting this endpoint system" into all its cable clusters.[16] Other companies have also announced plans to implement digital compression. Viacom, the Public Broadcasting Service, and Request TV have all announced deals to upgrade to digitally compressed video.[17]

11. Realizing that the 500 channel cable system is imminent, Discovery Communications has developed Your Choice TV, an interactive menu system for accessing hundreds of channels of digital programming.[18] Viewers will use the menu-driven, remote control system to navigate their way through the hundreds of viewing options which will soon be available to them. First generation equipment is expected by the end of 1993.[19]

Video Server Technology

12. As digital video compression is being combined with video server and switching technology, cable systems are now entering an era, as described by a Time Warner spokesman, of "infinite capacity." [20] Video server technol-

[15] Randy Sukow & Rich Brown, *Time Warner Unveils 'Full Service' TV*, Broadcasting, February 1, 1993, at 6.

[16] *Time Warner's 'Electronic Superhighway Into The Home'*, TV Digest, February 1, 1993, at 3. *See also* Johnnie L. Roberts & Mary Lu Carnevale, *Time Warner Plans Electronic 'Superhighway'*, Wall St. J., January 27, 1993, at B1.

[17] Weinschenk, *Compression Kickstart*, *supra*. *See also*, Lambert, *supra*.

[18] Peggy Ziegler, *500-Channel Future Prompts Menu System from Discovery Comm.*, Cable World, December 14, 1992, at 1.

[19] *Id.*

[20] Sukow & Brown, *supra*.

ogy is the key to providing true "video on-demand" to cable television viewers.

13. Video server technology fundamentally changes the way in which a cable system delivers video programming to the home. In a conventional cable system, all available programs are simultaneously transmitted through the entire cable system to every television receiver, even though each individual television set can only display one program at a time. Thus, to increase the number of channels available to the viewer, the cable must have the capacity to deliver all of these channels simultaneously to every viewer.

14. Video server technology changes all of this by effectively implementing the channel selector switch upstream in the cable system, toward the cable headend, so that only a single program is transmitted at a time to each receiver, much in the way the telephone system works. This means that the cable to the television receiver no longer needs the capacity to carry dozens of channels simultaneously, but only enough capacity to carry the program to be viewed. Thus, even without the use of fiber optics or video compression, existing cable infrastructure can carry a virtually limitless number of programming choices by use of video server technology.

15. In the Time Warner system being built in Orlando, Florida, homes are to be equipped with high-capacity, random access, digital storage devices capable of holding hundreds or even thousands of video programs.[21] Digitally compressed video programs will be sent in high speed bursts to the customer's home storage device and accessed "on demand" by the home viewer. High speed digital switching will handle the traffic flow of data bursts to the home storage device and allow Time Warner to offer telephone and data transmissions over the two-way system.[22]

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[21] *Id.*

[22] *Id.*

16. Video server and switching technology is being aggressively developed and implemented, not only by cable operators, but by the telephone companies to provide "video-on-demand."[23] It can and will provide virtually infinite capacity, since it eliminates the need to simultaneously transmit all available channels to each TV receiver.

17. Bell Atlantic is using digital compression and video server technology in its video dial tone systems.[24] Later this year, Bell Atlantic plans to begin offering this video-on-demand service over existing copper wires to 400 subscribers in Fairfax County, Virginia.[25] The Bell Atlantic system will store digitally compressed video on large, random access storage devices. A viewer will dial up the program of choice which will be routed through a video server, over existing copper wire telephone lines, to the viewer's home. Bell Atlantic will build two-way video server-based networks this summer in Morris County and Dover Township in New Jersey.[26] In each case, video server and video switching technology will be used to provide video dial tone service.

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[23] For example, US West recently announced a plan to build a fiber-based broadband network to deliver telephone, interactive video, and video-on-demand services to its 13 million customers in 14 western states. The system will reach its first 100,000 customers by 1994, with half a million new customers a year to be added after that. The US West system initially will be capable of carrying 70-100 video channels, expandable to 500 with compression. *US West Answers Video Dialtone Call*, Broadcasting, February 8, 1992.

[24] Harry A. Jessell, *Bell Atlantic Takes Early Lead*, Broadcasting, January 4, 1993, at 45. *See also* Carl Weinschenk, *Bell to Cable Industry: We'll See You in Court*, Cable World, December 21, 1992, at 1, 25.

[25] Jessell, *supra*.

[26] *Id. See also*, Rich Brown, *Twain Meet Over Video Dial Tone*, Broadcasting, November 23, 1992, at 4.

Conclusion

18. Recent events have confirmed that channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past. Cable operators are deploying fiber optics at a rapid pace. Video compression is being aggressively implemented as a cost effective method for literally multiplying the number of channels available. And, with the implementation of video server technology, we are witnessing the initiation of truly "infinite capacity" cable TV systems.

/s/
MICHAEL C. RAU

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF BARRY ROSENBLUM

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

BARRY ROSENBLUM, being duly sworn, deposes and says:

1. I am the President of Time Warner Cable of New York City ("TWCNYC"). I have been employed by Time Warner Cable and its predecessor entities for nearly 13 years.

2. TWCNYC consists of four cable franchises located in Brooklyn, Queens and Manhattan and also manages another franchise in Queens. TWCNYC is a division of Time Warner Cable ("TWC"), which is itself a division of Time Warner Entertainment Company, L.P. ("TWE"). TWCNYC reports to the Time Warner New York City Cable Group ("TWNYC Cable Group"), which oversees all New York City cable systems operated by or affiliated with TWC.[1]

3. TWCNYC's system in Manhattan operates pursuant to a renewal franchise granted by the City of New York on June 28, 1990 (the "Manhattan system"). The Man-

[1] In addition to those franchises comprising TWCNYC, TWNYC Cable Group also includes Staten Island Cable and Paragon Cable Manhattan ("Paragon"), the cable system operating in upper Manhattan.

hattan system covers the area of Manhattan from 86th Street on the East side and 79th Street on the West side South to the Battery, as well as Roosevelt Island ("Southern Manhattan"). The Manhattan system serves approximately 270,000 residential subscribers, along with bars, hotels and restaurants.

4. In my capacity as President of TWCNYC, I oversee the selection of programming services to be offered on TWCNYC's systems. TWCNYC's decision to offer a particular programming service to subscribers is a matter of editorial discretion. In selecting programming to offer to TWCNYC's subscribers, we consider such factors as the needs and interests of local audiences, including particular segments of that local audience, the educational and occupational characteristics of subscribers and the availability of news, information and entertainment from other sources, as well as any other factor that may reflect local demographic characteristics or the interest of subscribers.

5. TWCNYC also exercises its editorial discretion in determining the manner in which programming is made available to its subscribers. TWCNYC determines which programming should be packaged together into particular tiers or on a per channel basis. TWCNYC also assigns channel positions to each programming service to either facilitate tiering, to coordinate with other cable systems or to help make the system more accessible to the consumers. In developing its "package" of programming for subscribers, TWCNYC seeks to maximize the interest and satisfaction of its subscribers.

6. I am familiar with the provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). In particular, I am familiar with §§ 4 and 5 of that Act, the so-called must carry provisions. These provisions directly impinge upon TWCNYC's editorial discretion to select programming and thereby create a programming line-up that maximizes the satisfaction of subscribers. These provisions may force

TWCNYC to carry programming it does not want to offer to its subscribers and in which TWCNYC believes its subscribers have virtually no interest. Further, TWCNYC may be forced to eliminate a number of popular programming services in response to carriage requests under the Act, including some services which have particular appeal to diverse segments of TWCNYC's subscriber base.

7. The must carry provisions also provide broadcast channels with certain channel positioning rights. With its ability to assign channel positions constrained as it is by the Act, TWCNYC cannot package programming in the manner it believes best accommodates the wishes of its viewers.

8. An example of the intrusion upon TWCNYC's editorial discretion effected by the must carry provisions was recently presented to this Court in the proceedings involving TWCNYC and WNYC-TV. During the latter part of 1992, TWNYC Cable Group, in the exercise of its editorial discretion, decided to begin a realignment process for the channels on all its New York City cable systems, including the Manhattan system. The objective of the realignment process is to harmonize the offering of programming to subscribers (across the 76 or more activated channels each systems has), such that the same programming services would be carried on the same channel position in all TWC New York City cable systems. The realignment plan was intended to maximize the satisfaction of our current subscribers and present a channel lineup which would be most attractive and convenient to potential subscribers. Consistent channel alignment also facilitates TWCNYC's ability to advertise and submit program listings to newspapers and magazines. The realignment occurred on February 1, 1993 as the first step towards complete channel alignment.

9. As part of the realignment that occurred on February 1, WNYC-TV, a local non-commercial broadcast station, was moved from Channel 3 to Channel 31 on TWCNYC's Manhattan system and on the Paragon system. Channel 31 is its off-air broadcast channel as assigned by the FCC and the channel on which WNYC-TV was carried on the other TWC New York City systems.[2] As of February 1, WNYC-TV is carried on Channel 31 on all TWC New York City systems.

10. Although the repositioning of certain programming, including WNYC-TV, occurred on February 1, this exercise of TWCNYC's editorial discretion was not without substantial interference. Using the must carry provisions of the 1992 Cable Act, WNYC-TV attempted to abrogate TWCNYC's decision to realign its channels. After having been informed that it would be moved to Channel 31, WNYC-TV requested carriage pursuant to Section 5 of the 1992 Cable Act on the Manhattan system, and requested channel positioning on Channel 3. The carriage request, including the channel position request, were denied on December 21, 1992. WNYC-TV, after waiting nearly one full month, petitioned the FCC on January 19, 1993 for emergency relief seeking to stop TWCNYC's realignment plan and its repositioning to Channel 31. When the FCC denied that request on January 22, 1993, WNYC-TV proceeded to the Second Circuit Court of Appeals. Its request for a temporary restraining order was denied by that Court on January 28, 1993. This Court denied WNYC-TV's application for a temporary restraining order on February 1, 1993, after the realignment scheduled for that day had been completed.

[2] WNYC-TV was already carried on Channel 31 on TWCNYC's systems in Brooklyn and Queens, which serve a total of approximately 385,000 subscribers. It has been carried at that channel location on these systems since they commenced operation. On TWC's Staten Island system, serving approximately 75,000 subscribers, WNYC-TV has been located on Channel 31 since the Staten Island system commenced operation. Generally, it is our preference to put broadcasters with off air numbers on channel positions with the same number in order to avoid subscriber confusion. WYNC-TV was originally placed on Channel 3 on the Manhattan system because the Manhattan system at that time had fewer than 31 channels. As a result of the upgrading of the Manhattan system's physical plant, the system had sufficient activated channels to permit the positioning of WNYC-TV on Channel 31.

11. These proceedings, instituted by WNYC-TV pursuant to the must carry provisions, directly interfered with TWCNYC's editorial discretion. WNYC-TV tried to preclude TWCNYC from delivering programming to its subscribers in the manner TWCNYC believes is most responsive to their interests and in accord with TWCNYC's best business judgment.

12. The interference with TWCNYC's editorial discretion in carrying out the first step of its channel realignment plan could have been significantly more severe. As part of its goal to present a package of programming in a manner most responsive to subscribers' interests, TWCNYC's Manhattan system also moved WLIW, a local noncommercial broadcast station, from the Channel 34 position to its FCC assigned Channel 21 on the Manhattan system. Further, the Paragon cable system moved WLIW and WNYE, another local noncommercial broadcast station, to their respective FCC assigned channels on the Paragon system. This involved moving WLIW from Channel 10 to Channel 21 and WNYE from Channel 6 to Channel 25.

/s/ Barry Rosenblum
BARRY ROSENBLUM

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF CRAIG RONALD SHERWOOD

I, CRAIG SHERWOOD, declare as follows:

1. I am Senior Vice President Managing Director of Affiliate Relations of International Family Entertainment, Inc., owner and operator of The Family Channel. I have held this position since January 22, 1993. My responsibilities include the sale and distribution of The Family Channel to cable systems throughout the country. Prior to serving in this position, I was Vice President Managing Director of Affiliate Relations, of International Family Entertainment, Inc. A summary of the history and programming of The Family Channel is contained in the affidavit of Timothy B. Robertson, previously submitted in connection with this action. I submit this affidavit in support of plaintiffs' cross-motion for summary judgment.

2. The must-carry requirements of the 1992 Cable Act already are having a significant adverse affect on The Family Channel. Our ability to obtain further carriage on cable systems has come to a virtual halt since the passage of the 1992 Cable Act. Numerous operators have informed us that they will not be making any decision to add The Family Channel to their line-ups until after it becomes clear what their obligations will be with respect to must-carry. Many have expressed concern that must-carry will preclude them from adding new satellite services.

3. In addition, a number of cable systems have recently informed us that they are moving The Family

Channel from its existing channel positions to higher channel numbers in connection with their compliance with the must-carry requirements. Specifically, we have been informed that the changes listed on Exhibit "A", attached hereto and incorporated herein by above reference, will be made. (This listing is not exhaustive.)

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 10th day of February, 1993.

/s/ Craig R. Sherwood
CRAIG R. SHERWOOD

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF LYNETTE J. SIMPSON

STATE OF CALIFORNIA)
) ss:
COUNTY OF ALAMEDA)

Lynette J. Simpson, being first duly sworn, deposes and says:

1. I am Vice President of Marketing and Acquisitions of Sun Country Cable, Inc., Sun West Cable, Inc. and Oregon Sun Cable, Inc. (dba Sun Country Cable, "Sun"). I have been with the company since its inception in 1985. I have been Vice President and a Director of the company since 1987. I submit this Affidavit in support of Plaintiffs' motion for summary judgment.

Factual Background

2. Sun is a cable television company which presently operates 20 cable television systems serving 11,300 subscribers in the states of Washington, Oregon, and California. The size of these cable systems ranges from 76 subscribers in Wilson Creek, WA, to 1,729 in Groveland, CA. The cable systems are owned by two limited partnerships, Pacific Sun Cable Partners and Shady Cove Cable Partners.

3. Sun has no financial interest in any programming services, and does not select programming based on any internal financial interest.

4. The channel capacity in Sun's systems ranges from 30 to 60 channels. The amount of capital available to add programming on a system is largely a factor of the number of subscribers served by the system, particularly the cost of equipment necessary to receive and process each broadcast or satellite signal. At a minimum, adding one channel of programming in one system costs an average of $2,500 for headend and receiving equipment alone, regardless of whether there are 100, 1,000, or 10,000 subscribers in a system.

5. The company's objective in selecting new programming is to offer as much diversity as possible within the financial constraints imposed by the limited number of subscribers in each system. New channels are by necessity selected on the basis of their appeal to the greatest number of subscribers in each system.

6. Subscriber interest in a new service is primarily ascertained in three ways: (1) annual surveys which ask customers for their preferences on *type* of programming, as well as their interest in *specific* program services; (2) calls to the "Customer Hotline," which are received at company headquarters in Pleasanton, CA; and (3) requests customer service representatives get in the regional offices.

7. There are competing interests for inclusion on the remaining channels available in Sun's systems. In the last seven years, we as cable operators have exercised editorial discretion in choosing program offerings for carriage on our systems. In recent years, we have had much greater choice with the introduction of new programming networks, including those of Turner Broadcasting, Inc.

8. Because of the relative cost of adding channels in small systems, and limited channel capacity in some, the new commercial and non-commercial must-carry requirements contained in the Cable Television Consumer Protection and Competition Act of 1992 will mean that in some

systems we can no longer exercise editorial discretion in selecting new programming, and customer preference may have no standing whatever as we select that programming.

9. On the 36-channel Quincy, WA system, which serves 1,436 subscribers, all channels are filled. The system presently carries all five of the available Spokane broadcast stations, plus four Seattle/Tacoma stations. The system does not carry one independent broadcast station that could request carriage under the commercial must-carry statute. The station is not carried due to lack of subscriber interest. If forced to carry this station, we would have to drop another channel, and would be left with no discretion in choosing programming which is of greatest interest to our customers.

10. Two 36-channel systems, Coulee City, WA, with 268 subscribers, and Royal City, WA, with 200 subscribers, do not presently carry a noncommercial station because they are outside the market of any such stations. Under Section 5(b)(3) of the Act, Sun may be required to "import and carry" noncommercial stations to satisfy the Act's noncommercial requirements. In systems this size, programming choices must be made very carefully and appeal to the largest number of customers to justify the expense. For these systems to carry non-commercial stations which presently cannot be received "off-air," it would mean an expenditure of many thousands of dollars in each system, if it was technically possible to do it at all. This would certainly mean foregoing any other channel additions on these systems for a long time. For example, we would not be able to respond for requests from subscribers for services including The SciFi Channel or to add C-Span in locations where it is not presently carried.

Conclusion

11. The must-carry statute interferes with Sun's editorial discretion on what programming is carried on its

cable systems. It also interferes with our ability to make programming selections based on the preferences of our customers, and gives broadcasters preference in attaining carriage on our cable TV systems. Finally, it interferes with our rights as speakers under the First Amendment.

This 8th day of February, 1993.

/s/ Lynette J. Simpson
LYNETTE J. SIMPSON

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF SYLVIA SYCAMORE

STATE OF OREGON)
) ss:
COUNTY OF LANE)

Sylvia Sycamore, being first duly sworn, deposes and says:

1. I am Senior Vice President/Policy, Planning and Administration of Chambers Communications Corp., an Oregon corporation, which owns cable television systems in Oregon, Idaho and California through its various subsidiaries. I joined Chambers at its inception in 1983 and was appointed to my present position in 1992.

2. Novato Cable Company, dba Chambers Cable of Novato, is a wholly-owned subsidiary of Chambers Communications Corp., and operates a 35-channel cable television system serving approximately 17,400 subscribers in Novato, California and in adjacent portions of Marin County, California.

3. Chambers Cable of Novato is currently carrying programming on all 35 channels. That carriage includes twelve (12) local commercial television stations, three (3) non-commercial educational television stations and one (1) access channel. A list of the broadcast stations is attached. (Attachment 1).

4. Under the must carry rules in effect in 1983 when Chambers began operating this cable system, Chambers

formerly carried additional local broadcast signals. After those must carry rules were found unconstitutional, Chambers gradually dropped duplicative or minimally viewed stations in order to make channel space available to respond to customer demand for satellite-distributed cable programming and information services.

5. As of March 29, 1990, Chambers carried two additional local non-commercial educational stations, KCSM/San Mateo and KQEC/San Francisco.

6. On June 1, 1991, Chambers dropped KQEC in order to make channel space available to carry TNT, a satellite-delivered program service which was in strong demand by customers. According to a customer survey conducted by Chambers, KQEC was minimally viewed.

7. On January 27, 1992, Chambers dropped KCSM in order to make channel space available for an electronic program guide which replaced a print (paper) program guide which was seen as "environmentally irresponsible" by large numbers of subscribers and which had engendered intense public opposition. The same customer survey referred to in paragraph 6 indicated that KCSM was also minimally viewed.

8. On or about November 25, 1992, David H. Hosley, General Manager of KCSM, wrote to Kathleen Wagner, Area Manager of Chambers Cable of Novato, requesting carriage pursuant to Section 5 of the Cable Television Consumer and Competition Act of 1992. According to Ms. Wagner, that letter was received by her on December 2, 1992. At my request, she sent a copy to me via fax transmittal. A copy of that letter is attached. (See Attachment 2).

9. On December 9, 1992, I sent a letter to David H. Hosley via Federal Express declining his request. A copy of that letter is attached. (See Attachment 3).

10. On or about January 13, 1992, KCSM filed a Petition For Declaratory Ruling Under Section 5 of the

1992 Cable Act regarding its request for carriage. A copy of that Petition is attached. (See Attachment 4).

11. Chambers does not wish to carry KCSM.

CONSEQUENCES

If Chambers must carry KCSM, Chambers will be required to follow one of the following courses of action:

1. Drop one of the satellite program services currently carried to make room for KCSM. This action could constitute a breach of contract by Chambers with the dropped programmer. It would also be likely to cause intense customer dissatisfaction because customers could no longer view the dropped signal. Chambers has not yet identified which service might be dropped.

2. Activate cable channel 36. To do this would require Chambers to place a converter in the home of every subscriber who wished to view the programming on Ch. 36. Chambers has not yet determined which service might be placed on Ch. 36.

To automatically place a converter in all 17,400 homes could be prohibitively expensive, especially in the light of present uncertainties about how the FCC will allow operators to recover the cost of such equipment.

If customer are required to purchase or rent a converter in order to receive only one additional channel, many would understandably be outraged. We would expect considerably fewer than 17,400 to avail themselves of this programming. We would therefore expect strong protest and could be subject to potential legal action from any programmer whose programming was moved into the Ch. 36 position.

3. Rebuild the cable system to create more channels. This option is even more costly than No. 2. While it is likely that the cable system in Novato will eventually be rebuilt or otherwise technologically altered to increase

channel capacity, Chambers feels very strongly that this should happen as a result of a well-thought out business plan based on long-term customer demand and willingness to pay for additional services. Forced expansion to accommodate KCSM would be a poor business move.

In any of the above situations, further disruption would ensue if KCSM (Channel 60) continues in its demand to be carried on the cable channel where it was carried on July 19, 1985. Nickelodeon, a highly acclaimed children's channel is currently carried on cable channel 13, where KCSM was carried in 1985.

/s/ Sylvia Sycamore
SYLVIA SYCAMORE
Senior Vice President
Policy, Planning & Administration

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

INTERVENOR-DEFENDANT APPLICANT NATIONAL ASSOCIATION OF BROADCASTERS' RESPONSE TO PLAINTIFFS' STATEMENTS OF MATERIAL FACTS

Pursuant to Local Rule 108(h) of the Rules of this Court, Intervenor-Defendant Applicant National Association of Broadcasters ("NAB") submits this response to the statements of material fact submitted on February 12, 1993 by the Turner, TWE, NCTA and Discovery plaintiffs ("plaintiffs") in support of their untimely motions for summary judgment regarding the must carry provisions.

First, plaintiffs' statements of material fact should be stricken, and no response thereto should be required, because they are untimely, and plaintiffs have waived their right to seek summary judgment with respect to the must carry provisions.[1]

Second, without prejudice to NAB's argument that no response to those untimely statements of material fact is required, NAB denies those statements of material fact insofar as they dispute the Congressional findings of fact contained in Sec. 2(a) of the 1992 Cable Act. There was ample evidence before Congress to support those findings of fact. *See* the Amicus brief of the United States Senate, filed February 12, 1993; Intervenor Defendant National

[1] *See* NAB's Reply To The Daniels And Turner Oppositions To NAB's Motions For Summary Judgment, And Opposition To The Untimely Motions For Summary Judgment Regarding The Must Carry Provisions Filed By Turner, TWE, NCTA and Discovery, filed herewith.

Association of Broadcasters' Corrected Memorandum In Opposition To The Plaintiffs' Motion For Preliminary Injunction, dated November 24, 1992, at 9-26; Affirmation of Jack N. Goodman dated November 24, 1992.

Third, to the extent plaintiffs' statements of material fact assert other facts, and to the extent the Court deems those other facts to be material, NAB denies those facts pursuant to Rule 56(f), Fed. R. Civ. Pro. until it has had an opportunity to investigate those facts through discovery.[2]

Fourth, to the extent plaintiffs' statements of material fact are really legal conclusions, no response is required.

Respectfully submitted,

/s/ Bruce J. Ennis, Jr.
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(D.C. #360598)
DAVID W. OGDEN
(D.C. #375951)
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Counsel for National
Association of
Broadcasters

[2] *See* the Affirmation of Jack N. Goodman, submitted herewith.

Of Counsel:
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BENJAMIN F. P. IVINS
JACK N. GOODMAN
NATIONAL ASSOCIATION OF BROADCASTERS
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Dated: February 19, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JACK N. GOODMAN

DISTRICT OF COLUMBIA: SS

I, Jack N. Goodman, affirm pursuant to the penalties of perjury, as follows:

1. I am special counsel to intervenor-defendant applicant National Association of Broadcasters ("NAB"). I submit this affirmation pursuant to Rule 56(f), Fed. R. Civ. Pro., in opposition to the motions for summary judgment regarding the must carry provisions of the 1992 Cable Act filed on February 12, 1993 by the Turner, TWE, NCTA and Discovery plaintiffs ("plaintiffs"). NAB believes those motions should be stricken or denied on the ground they were not timely. This affirmation is submitted without prejudice to that argument.

2. Those motions were accompanied by detailed statements of material fact that were allegedly not in dispute, and by lengthy affirmations and affidavits in support of those allegations.

3. Insofar as those statements of material fact dispute the Congressional findings of fact contained in Sec. 2(a) of the 1992 Cable Act, NAB vigorously denies them. The Congressional findings of fact were amply supported by the evidence before Congress. *See* my Affirmation dated November 24, 1992, which is incorporated by reference, and the Amicus Brief of the United States Senate.

4. Insofar as those statements of material fact assert *other* facts, and insofar as the Court deems those other facts to be material, NAB has been utterly unable, between receipt of plaintiffs' papers and today, February 19th, to investigate the factual accuracy and veracity of those other factual assertions. In the limited time available it has not been possible to compile specific responses, with references to the record (insofar as there are facts in the record) to each of the assertions of fact. Nevertheless, I believe that many of those other factual assertions are incorrect, exaggerated, or so taken out of context as to be misleading, and I believe that if NAB were permitted to engage in discovery, that process would produce facts essential to opposing plaintiffs' motions for summary judgment.

5. NAB believes that the only facts that are relevant, material, and necessary to resolution of the constitutionality of the must carry provisions are the facts found by Congress in Sec. 2(a) of the Act, and supported by the extensive hearing record and committee reports described in my November 24, 1992 Affirmation. Nevertheless, if the Court believes that any facts other than the facts contained in the record before Congress may be relevant, material or necessary to resolution of the constitutionality of the must carry provisions, NAB respectfully requests, pursuant to Rule 56(f), the opportunity to engage in discovery regarding those facts.

6. Specifically, if facts other than the facts before Congress are to be considered, NAB requests the opportunity to depose all persons submitting affirmations or affidavits on behalf of any of the plaintiffs in these consolidated actions, the opportunity to propound interrogatories and document requests to plaintiffs, and the opportunity to depose other persons who may have knowledge relevant to those other facts.

7. The subjects of that discovery process should include, without limitation, plaintiffs' actual plans regarding

dropping or repositioning broadcast stations or cable programmers; plaintiffs' plans regarding expansion of channel capacity and installation of addressable converters in the next five years; the financial and other relationships between cable operators and cable programmers; the extent to which cable operators have disregarded viewer preferences, particularly when their financial self-interests differed from those preferences; whether cable operators have reached explicit or implicit agreements among themselves to drop and/or reposition certain broadcast stations, and/or to add and/or reposition certain cable programmers; whether cable operators reached explicit or implicit agreements among themselves not to drop or reposition broadcast stations while Congress was considering enactment of the 1992 Cable Act; the profitability of cable systems and their financial ability to expand channel capacity; etc.

8. If plaintiffs' motions for summary judgment are not stricken or denied as untimely, and if the Court deems it appropriate to consider facts other than the facts before Congress, NAB respectfully requests that those motions be adjourned without date so that NAB can have an opportunity to engage in the discovery described above.

/s/ Jack N. Goodman
JACK N. GOODMAN

DATED: February 19, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF SEYMOUR KAPLAN

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

Seymour Kaplan, being duly sworn, deposes and says:

1. I am the Senior Vice President of Affiliate Relations of Hearst/ABC-Viacom Entertainment Services ("HAVES"). I make this affidavit in support of the plaintiffs' cross-motion for summary judgment.

2. HAVES is a joint venture operating as a partnership under the laws of the State of New York. Among HAVES' owners are The Hearst Corporation, Capital Cities/ABC Inc. and Viacom International, Inc.

3. HAVES offers television programming for exhibition to viewers primarily over the facilities of cable system operators on its television program service called The Lifetime Television Network ("Lifetime"). Lifetime is a 24-hour per day service offering original and previously produced television programs of particular interest to women six days per week (Monday through Saturday). On the seventh day (Sunday), Lifetime offers Lifetime Medical Television ("LMT"), the world's foremost provider of television programs produced for medical professionals.

4. Lifetime is made available to viewers primarily through cable television operators. The cable operators receive or originate television signals from different sources and retransmit such signals to subscribers over coaxial and fiber optic cables. Operators select the programming to offer to their subscribers from sources including local television broadcast stations, distant television broadcast stations, locally originated cable programming, and cable network programming, such as Lifetime.

5. Since the enactment into law of the Cable Television Consumer Protection Act of 1992 (the "Act"), Lifetime's ongoing effort of retaining and expanding its universe of subscribers has met with resistance from cable operators which are concerned about the application of the Act to their operations. For example, the cable operators listed below do not currently carry Lifetime and, prior to the enactment of the Act, were negotiating with HAVES for the right to do so. Since passage of the Act, however, each of these cable operators has adopted a "wait-and-see" attitude, indicating that they may or may not be able to carry Lifetime in the future because of the Act's must carry requirements.

Time Warner for Marion, Indiana

Comcast/Storer for Groton, Connecticut

Western Cable for South, San Francisco

Cableholdings for Oak Ridge, Tennessee

Omega Cable for Omega, Illinois

6. Channel position is important to all telecasters, broadcast and cable alike. Telecasters seek to develop viewer association through channel position. Also, as a general proposition, the lower numbered the channel position the more desirable it is to the telecaster. Since the enactment of the Act, Lifetime has been materially harmed by having its channel position changed on the following cable systems as follows:

Operator	Location	Channel
Cable Vision Industries	Chatsworth, CA	from 25 to 63
Telecommunications, Inc.	Westchester, NY	from 15 to 58
Sammons	Glendale, CA	from 17 to 36
Booth American	High Dessert, CA	from 13 to 33
Adelphia	Charlottsville, VA	from 48 to 57

In each instance these changes have been brought about because of anticipated obligations under the "must-carry" provision of the Act.

This 16th day of February, 1993

/s/ Seymour Kaplan
SEYMOUR KAPLAN

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF EDWARD J. WEISS

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

EDWARD J. WEISS, being duly sworn, deposes and says:

1. I am associated with the firm of Cravath, Swaine & Moore, counsel for plaintiff Time Warner Entertainment Company, L.P. ("TWE"). I make this affidavit in support of TWE's pending Motions for Summary Judgment and for a Preliminary Injunction and in Opposition to the Government's Motion to Dismiss.

2. I have examined the 1993 catalog of a national electronics retailer, Radio Shack, a Division of Tandy Corporation. The 1993 catalog promotes numerous electronic parts, components and products.

3. In the catalog, Radio Shack advertises various television antennae designed to improve a television owner's reception of over-the-air broadcast signals.

4. On page 98 of the catalog, one particular line of roof top antennae is promoted as "provid[ing] outstanding reception at an outstanding value". The antennae of this line range in prices from as low as $27, plus installation costs. On page 104, the catalog promotes various indoor amplified antennas, ranging from a low of about $30 to a high of about $60. On this same page, the cata-

log also promotes other antenna devices as "Affordable Solutions to TV Reception Problems". These devices range in price from about $2 to $16. (True and correct copies of the catalog cover and relevant pages are annexed hereto as Exhibit 1.)

5. Annexed hereto as Exhibit 2 is a true and correct copy of page 7 of Paul Kagan Associates', *Cable TV Investor*, June 23, 1992.

6. Annexed hereto as Exhibit 3 is a true and correct copy of a press release dated February 12, 1993 from the Federal Communications Commission, entitled "FCC Upholds Modified Network-Cable Cross-Ownership Prohibition". (The text of this decision is not yet available.)

/s/ Edward J. Weiss
EDWARD J. WEISS

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO TURNER'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting Inc. (collectively "the public broadcasters"), submit this Response to Turner's Statement of Material Facts.

The public broadcasters assert that none of the facts asserted by Turner are material to plaintiff's facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiffs' affidavits as material facts going to the merits of plaintiffs' motion for summary judgment, the public broadcasters would need to test those allegations through discovery. There has, however, been no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or

evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiffs' averments in its Statement of Material Facts As To Which There Is No Genuine Issue ("Turner Facts").

1. The first sentence of this paragraph contains a legal conclusion, not a statement of fact to which a response is required. As to the second sentence, the public broadcasters would need to conduct discovery to test the truth of the allegations contained therein, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

2. Undisputed.

3. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act. Section 2(a)(3) of the Act does not support the second sentence of this paragraph.

4. The first sentence of this paragraph is a characterization, not a statement of fact to which a response is required. The public broadcasters do not dispute that public television stations transmit their signals over-the-air, both directly to television sets and indirectly to cable systems for subsequent retransmission. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in the final sentence of this paragraph, which are directly contrary to Congress' findings in the 1992 Act. *See, e.g.*, 1992 Act § 2(a)(17). Even if true, these allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

5. The public broadcasters would need to conduct discovery to test the truth of the allegations in this paragraph, but refer the Court to other parties' submissions,

which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

6. The allegations contained in the first sentence of this paragraph are not supported by any citation to the record, and therefore no response is required. The allegations contained in the second sentence of this paragraph are characterizations and legal conclusions, not statements of fact to which a response is required. The public broadcasters respectfully refer the Court to the opinions referenced in this paragraph for an accurate statement of their holdings.

7. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act. Further, these allegations are not based on *record* evidence, as required by Local Rule 108(h).

8. The first sentence of this paragraph mischaracterizes the cited report, which found (at p. 11) that 279 broadcast stations were dropped on 753 occasions under the FCC's 1986 interim must carry rules. The Court is respectfully referred to the cited report. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

9. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in

this paragraph, particularly because the allegation that "the elimination of must carry requirements has produced a substantial increase in the number and diversity of cable programming services" is contrary to Congress' findings in the 1992 Act. *See, e.g.*, 1992 Act § 2(a)(13) & (17).

10-12. The allegations contained in these paragraphs are characterizations and speculation, not statements of fact to which a response is required. In addition, the cited portions of the McGuirk, Davatzes, Kerr, Sherwood, Michaelis, and Robertson affidavits consist of inadmissible hearsay. Further, whenever the Burchill, Hanson, Wyant, Marx, Segel, and Hanson affidavits refer to specific local non-commercial educational television stations, the affidavits do not aver that any of the Turner systems *will* have to add broadcast stations, but only that they *may* have to take such action. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs.

13. The public broadcasters deny that the "discretion" exercised by cable operators in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. The statements and affidavits of Turner and other plaintiffs in this action, *see* Gardner Aff. ¶ 5-6, TWE Statement of Facts ¶ 8, *TWE* Collins Aff. ¶¶ 13, 16-17, 60, demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial. To the extent that this paragraph contains factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

14. The allegations contained in this paragraph are characterizations and speculation, not statements of fact to which a response is required. The assertion as to the alleged "preferences of the viewing public" is inadmissible

hearsay. To the extent that this paragraph contains factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

Respectfully submitted,

s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO TIME WARNER'S STATEMENT OF MATERIAL FACTS (MUST-CARRY)

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to Time Warner's Statement of Material Facts with respect to plaintiff's must carry claims.

The public broadcasters assert that none of the facts asserted by Time Warner are material to plaintiff's facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiff's affidavits as material facts going to the merits of plaintiff's motion for summary judgment, the public broadcasters would need to test those allegations through discovery. There has, how-

ever, been no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiff's averments in its Statement of Material Facts As To Which There Is No Genuine Issue ("TWE Facts").

1. This paragraph contains a characterization of the 1992 Act, and the Court is respectfully referred to section 28 of the statute for the precise terms governing its effective date.

2-4. Undisputed.

5. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

6. The public broadcasters would need to conduct discovery to test the truth of the allegations in this paragraph, but refer the Court to plaintiff's own submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g.*, Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

7-11. The public broadcasters deny that the "discretion" exercised by Time Warner Cable ("TWC") and its local divisions in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. Plaintiff's Statement (¶ 8) and affidavits (*TWE* Collins Aff. ¶¶ 13, 16-17, 60) demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial. *See Turner* Gardner Aff. at ¶ 5-7. To the extent that these paragraphs contain factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

12-21. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

22-23. The public broadcasters do not dispute that TWC "compete[s]" with over-the-air broadcasting, but the nature of that competition—as Congress found—has become increasingly one-sided. As a result of cable's emergence as the "dominant nationwide video medium," *id.* § 2(a)(4), "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." 1992 Cable Act § 2(a)(16). Free local broadcasting cannot now compete on equal terms with vertically integrated operators and programmers like TWC. The public broadcasters do not dispute that the physical limitations on the ability to construct multi-channel video distribution systems are different from the physical scarcity of the broadcast spectrum, but, as Congress found, the physical and economic limitations on constructing cable systems have resulted in virtually no competition between cable systems. 1992 Cable Act § 2(a)(2)(3).

24-26. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in

these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

27. This paragraph contains plaintiff's speculation as to the impact of the Cable Act's must carry provisions, not statements of fact to which a response is required. If these assertions are regarded as statements of fact, the public broadcasters would need to conduct discovery to test their truth. Furthermore, some or all of the systems cited in this paragraph may be able to resist requests for carriage on non-constitutional grounds, as Time Warner is doing with respect to its system in Bakersfield, California. See Exhibit A to Public Broadcasters' Opposition To Plaintiffs' Motions For Summary Judgment (2/19/93). Indeed, whenever the cited affidavits refer to specific local non-commercial educational television stations, the affidavits do not aver that any of the TWC systems *will* have to add broadcast stations, but only that they *may* have to take such action. Even if these statements are true, they are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

28. This paragraph contains plaintiffs' speculation as to the impact of the 1992 Cable Act's must carry provisions, not statements of fact to which a response is required. Indeed, the second sentence of this paragraph only asserts that the TWE systems "may" have to carry certain broadcast stations under the Act. Furthermore, the estimated number of "must carry channels" includes channels already being carried and does not distinguish between commercial stations and non-commercial stations. Accordingly, this statement does not accurately describe the effect that Section 5 of the 1992 Cable Act will have on plaintiff's cable systems. If the assertions in this paragraph are considered allegations of fact, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Cable

Act. The public broadcasters also deny that the "discretion" exercised by TWC and its local divisions in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. Plaintiff's Statement (¶ 8) and affidavits (*TWE* Collins Aff. ¶¶ 13, 16-17, 60) demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial.

29. This paragraph contains plaintiff's speculation as to the impact of the 1992 Cable Act's must carry provisions, not statements of fact to which a response is required. Indeed, the cited affidavits do not aver that TWC's systems *will* have to drop or reposition any particular cable programming service, but only that they *may* have to take such action. Any implication, however, that the Cable Act has directly caused or will directly cause drops of particular programming services—to the exclusion of all other factors that could cause such drops—is denied. As demonstrated by plaintiff's affidavits, there are many business reasons why cable operators drop or reposition programming services. *See, e.g.*, Collins Aff. ¶ 13, 16-17, 60.

30. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

31. The public broadcasters would need discovery to test the truth of the allegations contained in the first sentence of this paragraph, but even if true the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act. The remaining sentences are undisputed, but are not material to plaintiff's facial challenge to Section of the 1992 Act.

32-34. These paragraphs contain plaintiff's speculation as to the impact of the Cable Act's must carry provisions,

not statements of fact to which a response is required. If these assertions are considered allegations of fact, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

Respectfully submitted,

/s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO NATIONAL CABLE TELEVISION ASSOCIATION'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to National Cable Television Association's (NCTA's) Statement of Material Facts with respect to plaintiff's must carry claims.

The public broadcasters assert that none of the facts asserted by NCTA are material to plaintiff's facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (1992) (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiff's affidavits as material facts going to the merits of plaintiff's motion for summary judgment. the public broadcasters would need

to test those allegations through discovery. There has, however, been no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiff's averments in its Statement of Material Facts As To Which There Is No Genuine Issue ("NCTA Facts").

1. Undisputed.

2-4. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

5-8. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act. The public broadcasters refer the Court to the submissions of other parties in this action, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); *TWE* P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

9-10. These paragraphs contain characterizations, conclusions of law, or speculation as to the impact of the

1992 Act, not statements of fact to which responses are required. Indeed, whenever the cited affidavits refer to specific local non-commercial educational television stations, the affidavits do not aver that any cable operator *will* have to add broadcast stations, but only that they *may* have to take such action. In addition, the cited portions of the McGuirk, Holloway, Masters, and Robertson affidavits consist of inadmissible hearsay. The public broadcasters respectfully refer the Court to the statute.

11-12. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

13. The allegations contained in this paragraph are not supported by affidavits containing admissible evidence, but rather by inadmissible hearsay. Moreover, the cited paragraph of the Klein Affidavit does not purport to set forth the number of qualified non-commerical educations stations as that term is defined by Section 5 of the Act. Even if properly supported, however, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

14-19. The allegations contained in these paragraphs are not supported by affidavits containing admissible evidence, but rather by inadmissible hearsay. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

20. Undisputed.

Respectfully submitted,

/s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO DISCOVERY COMMUNICATIONS' STATEMENT OF MATERIAL FACTS (MUST-CARRY)

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to Discovery Communications' Statement of Material Facts with respect to plaintiffs' must carry claims.

The public broadcasters are unable to respond to plaintiffs' Statement because plaintiffs have not complied with the requirement of Local Rule 108(h) that the Statement "shall include references to the parts of the record relied on to support the statement." Local Rule 108(h) (D.D.C.). Because plaintiffs have not identified the portions of the record on which they rely for their averments, the public broadcasters are not obliged to formulate a response to Discovery's allegations. The public broadcasters reserve the right to file a response under Local Rule 108(h) if Discovery in the future complies with the local rules.

Respectfully submitted,

/s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO TURNER BROADCASTING SYSTEM, INC.'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h), defendants hereby respond to Turner Broadcasting System, Inc.'s ("Turner") statement of material facts allegedly not in dispute.

Before responding to Turner's specific fact allegations, defendants first object to plaintiff's assertion that these allegations are "material" to the Court's determination of the constitutional validity of the must-carry provisions. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("the substantive law will identify which facts are material"). It is established law that Congress' legislative judgment, especially when based on empirical evidence, is owed great deference, and that it is not for the courts to reweigh the evidence *de novo*.[1] Yet, in contravention of these principles, plaintiffs in each of the above-captioned cases ask the Court to weigh their "evidence" *de novo*, and to draw its own conclusions on the basis of that evidence respecting such issues as the need for the must-carry provisions, and the impact of these provisions on the ability of cable operators and programmers to reach the country's television households. Congress, on the basis of the empirical evidence obtained in the course of legislative hearings, has issued its own judgment on these issues, and it is that legislative judgment to which great deference is owed.

[1] *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue"); *Westside Community Bd. Of Ed.* v. *Mergens*, 496 U.S. 226, 251 (1990) ("Given the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,' . . . . we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical evidence."); *Jacobs* v. *Barr*, 959 F.2d 313, 319 (D.C. Cir.), *cert. denied*, 113 S.Ct. 95 (1992) ("we *should* defer—or give 'great weight'—to Congress on empirical questions.") (emphasis in original); *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) ("we must review Congress' judgment deferentially, without reweighing the evidence de novo.").

Defendants have moved to dismiss plaintiffs' constitutional challenges to the Cable Act's must-carry provisions as a matter of law under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pursuant to that motion, defendants respectfully submit that plaintiffs' facial challenges must be adjudicated on the basis of the legislative record, and not pursuant to a separate record generated in the course of judicial proceedings. *See Metro Broadcasting, Inc.* v. *FCC*, —— U.S. ——, 110 S.Ct. 2997, 3013 (1990) (" 'Congress, of course, may legislate without compiling the kind of record appropriate with respect to judicial or administrative proceedings' ") (citation omitted). In the alternative, in the event that the Court intends to treat plaintiffs' fact allegations as "material facts" and to judge the constitutionality of the must-carry provisions on the basis of a "trial-type" record, defendants respectfully reserve the opportunity to contest plaintiffs' allegations either through Rule 56(f) discovery or by the submission of affirmative evidence. *See* Declaration of John Tyler, ¶ 6 (attached hereto).

Without waiving the above-stated objections, defendants respond to plaintiff Turner's statement of material facts, identified by reference to specific numbered paragraphs, as follows:

1. The first sentence sets forth a conclusory statement of law, together with plaintiff's stated opinion regarding the type of programming it offers the public, to which no answer is required. Because plaintiff's affiant does not identify the source for the statistic stated in the second sentence of this paragraph, defendants are unable to determine its validity without discovery. Defendants otherwise do not dispute that cable program networks provide a diverse mix of cable programming.

2-3. Not disputed.

4. Defendants deny the first and fourth sentences. *E.g.*, the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), § 2(a)(17); H.R. Rep. No. 628, 102d Cong., 2d Sess. 54 (1992) ("House Report"); S. Rep. No. 92, 102d Cong., 2d Sess. 42-46, 59 (1991) ("Senate Report"). Sentences 2 and 3 are not disputed.

5. Defendants deny that plaintiff's "proof" supports its proposition that "many cable systems currently have reached or are close to reaching the limit of their channel capacity." Plaintiffs' affiants, mostly by means of hearsay testimony, identify a very limited number cable systems that have allegedly reached their channel capacity limitations. *See e.g.*, Affidavit of Terrence F. McGuirk, ¶ 25 (identifying 6 cable systems that have "informed" Turner that they have no available channels); Affidavit of Lee Masters, ¶ 6 (4 cable systems); First Affidavit of Douglas Holloway, ¶ 9 (14 cable systems); Affidavit of Sylvia Sycamore, ¶ 3 (1 cable system). There are approximately 11,314 operating cable systems in the United States today. *Broadcasting and Cable Market Place* xxiii (1992).

With respect to the second sentence of this paragraph, defendants assume as true the statement that, for a variety of reasons, there is competition for open channels on cable systems, and that, in certain markets, this competition is great. However, defendants otherwise deny the second

sentence to the extent that plaintiffs suggest that the Cable Act's must-carry requirements will deny cable programmers opportunity to get on cable systems. Congress has determined that the must-carry provisions will leave "ample opportunity" for carriage of cable programs. *E.g.*, House Report at 66. Also, plaintiffs' proof is speculative at best regarding the potential future impact of the must-carry provisions. *See e.g.*, McGuirk Affidavit, ¶ 27 (identifying certain instances "where the must carry statute *would appear* to provide additional broadcast station carriage rights that would displace existing speakers.") (emphasis added).

6. Defendants deny the first sentence. *E.g.*, House Report at 66, 71; Cable Act, §§ 614(b)(1), 615(b)(3). *See* Defendants' memorandum in support of their motion to dismiss at 39-43 (Feb. 12, 1993). The second sentence contains plaintiffs' conclusory interpretation of case law to which no answer is required.

7. Defendants do not dispute the assertion in the first sentence that there has been growth in the number of commercial and noncommercial stations since 1985. Defendants do not dispute the remainder of this paragraph.

8. This paragraph accurately reflects various of the statistics compiled by the FCC pursuant to its 1988 survey. The significance of these statistics, as judged by Congress, is explained in the House and Senate Committee Reports. House Report at 52; Senate Report at 42-43.

9. Defendants deny that plaintiffs' proffered testimony supports their allegation that "[t]he elimination of must carry requirements has produced a substantial increase in the number and diversity of cable programming services." Plaintiffs offer no factual basis to show that they could not have expanded their viewing audiences or have launched new cable networks like TNT and E! Entertainment but for the absence of mandatory requirements.

Defendants would require discovery to determine the truth of the averments in the remainder of this paragraph, but even if true, these allegations are immaterial to plaintiff's challenges to the must-carry provisions.

10. Defendants deny the first sentence. *E.g.*, House Report at 66-67, 71-72; Senate Report at 61-62. Defendants would need to conduct discovery to determine the validity of the assertions made in the second sentence. Defendants note that much of plaintiffs' testimony is speculative. *See e.g.*, Affidavit of Nickolas Davatzes, ¶ 6 ("Cable operators, to comply with the new statutory requirements with respect to preferential carriage and channel position . . . *may be forced to* (i) drop [the Arts & Entertainment Network] entirely from cable systems.") (emphasis added); Affidavit of Thomas F. Burchill, ¶ 10 ("[The Lifetime Television Network] *may* be required to forfeit existing channel positions completely . . . .") (emphasis added).

11. Defendants deny that plaintiffs' proffered testimony establishes the factual validity of the assertion made in this paragraph. This testimony represents, instead, the predictive judgment of plaintiffs' affiants respecting the future impact of the Cable Act's channel repositioning requirements on the ability of cable program networks to reach "their intended audience."

12. Defendants deny that plaintiffs' proffered testimony establishes the factual validity of the assertion made in this paragraph. This testimony represents, instead, the predictive judgment of plaintiffs' affiants respecting the burden that will allegedly be imposed upon cable program networks by the Cable Act's must-carry provisions.

13. Defendants deny the assertion made in this paragraph. *E.g.*, House Report at 66-67, 71-72; Senate Report at 61-62.

14. Because the first sentence of this paragraph assumes the factual validity of plaintiffs' earlier statements,

it must be denied. Without discovery, defendants are unable to admit or deny the assertions made in the second and third sentences of this paragraph respecting the "viewer preference" surveys conducted by plaintiffs' affiants and the alleged results of these surveys.

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General

JAY B. STEPHENS
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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO TIME WARNER ENTERTAINMENT CO.'S STATEMENT OF MATERIAL FACTS ALLEGEDLY NOT IN DISPUTE

Pursuant to Local Rule 108(h), defendants hereby respond to plaintiff Time Warner Entertainment Company's ("Time Warner") statement of material facts allegedly not in dispute. Defendants incorporate by reference their objections made this date in response to plaintiff Turner Broadcasting System, Inc.'s statement of material facts. Defendants otherwise respond to plaintiff Time Warner's statement of material facts, identified by reference to specific numbered paragraphs, as follows:

1-4. Not disputed.

5-21. Defendants would need to conduct discovery to determine the truth of these allegations, but even if true, the allegations are immaterial to plaintiff's challenges to the Cable Act's must-carry provisions.

22. Not disputed. *But see*, H.R. Rep. No. 628, 102d Cong., 2d Sess. 43-47 (1992) ("House Report") (competition to cable television in the video market place is negligible).

23. Defendants do not dispute the assertion in the first sentence that cable television is technologically distinct from broadcast television. Defendants do not dispute the assertion in the second sentence that there exist no absolute *physical* limitations to the construction of cable systems equivalent to the physical scarcity of the broadcast spectrum.

24. Not disputed. *But see*, House Report at 43-47 (competition to cable television in the video market place is negligible).

25. Defendants dispute this assertion to the extent that plaintiffs suggest that the traditional print media and radio offer direct competition to cable television in the video market.

26. Defendants do not dispute that plaintiff has received requests for must-carry by the parties identified in this paragraph, although defendants note that the must-carry request addressed to Tri-County Cable (Salem, New Jersey) was subsequently withdrawn. Apfelbaum Affidavit, ¶ 7.

27. Defendants do not dispute that plaintiff might be required to carry broadcast stations on its cable systems that it would otherwise not carry in absence of the must-carry provisions.

28. Defendants do not dispute that, under section 4 of the Cable Act (governing commercial stations), the signal carriage requirements are limited to only approximately one-third of a cable system's usable channels. The remainder of this paragraph does not set forth facts but, instead, plaintiffs' approximations of the possible number of cable channels that might be dedicated to PEG, leased access, or broadcast stations under the Cable Act.

29. Defendants would need to conduct discovery to determine the truth of the allegations in this paragraph. Defendants note that the testimony offered in support of these assertions is largely speculative. *See e.g.*, Affidavit of William C. Carey, ¶ 4 ("To carry WYED, the system would possibly have to drop a satellite delivered programming service . . . ."). Defendants otherwise dispute that plaintiff's proffered testimony substantiates its assertion that a *substantial* number of services that are currently carried on plaintiff's cable systems will have to be dropped or repositioned as a result of the Cable Act's mandatory

carriage requirements. Plaintiff's testimony refers to a very limited number of services being carried on a very limited number of cable systems in the country. *See* Broadcasting and Cable Market Place, xxiii (1992) (there are approximately 11,314 cable systems in the country).

30-31. Defendants do not dispute that plaintiff engaged in litigation with WNYC-TV which resulted in proceedings before the Court. The remainder of these paragraphs contains plaintiff's characterizations of this litigation and plaintiff's alleged purposes for commencing its "realignment process." Even if these characterizations are assumed as true, they are immaterial to plaintiff's challenges to the Cable Act's must-carry provisions.

32. Defendants dispute that plaintiff's proffered testimony substantiates the assertion made in the first sentence. *See e.g.*, Affidavit of Mathew Kasman, ¶¶ 5-6 (testifying that 2 cable systems—out of approximately 11,314 systems in the country: Broadcasting and Cable Market Place, xxiii (1992)—*might* not carry HBO on *multiple* cable channels as a result of must-carry). Defendants further dispute that plaintiff's proffered testimony substantiates the assertion made in the second sentence. *See* Affidavit of Jeffrey Bewkes, ¶ 11 (making a conclusory statement, without supporting proof, that must-carry "will seriously impede HBO's efforts to provide its HBO and Cinemax services in multiplexed format"); Kasman Affidavit, ¶¶ 2-6 (stating that 2 cable operators have represented that they will not negotiate about "multiplexing" HBO and Cinemax until the constitutionality of the must-carry provisions is determined); Affidavit of David Hanson, ¶¶ 2-3 (stating that he was informed by a single cable system that it could not commit to dedicating a channel to Cinemax "due to the impending cable legislation being considered by Congress").

33. Defendants do not dispute that the Cable Act's channel repositioning provisions might possibly allow a

broadcast station to obtain carriage on a cable channel currently occupied by HBO, although plaintiff's testimony in support of this proposition is purely speculative. *See* Bewkes Affidavit, ¶ 12.

34. Defendants do not dispute that cable channels occupied by broadcast stations as a consequence of the must-carry provisions will be unavailable to other services offered by cable programmers.

STUART E. SCHIFFER
Acting Assistant Attorney General

JAY B. STEPHENS
United States Attorney

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THEODORE C. HIRT

/s/ John R. Tyler
JOHN R. TYLER

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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO THE NATIONAL CABLE TELEVISION ASSOCIATION INC.'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h), defendants hereby respond to plaintiff National Cable Television Association Inc.'s ("NCTA") statement of material facts allegedly not in dispute. Defendants incorporate by reference their objections made this date in response to plaintiff Turner Broadcasting System, Inc.'s statement of material facts. Defendants otherwise respond to plaintiff NCTA's statement of material facts, identified by reference to specific numbered paragraphs, as follows:

1. Not disputed.

2. Not disputed.

3. Plaintiff's affiant does not identify his source for the statistics stated in this paragraph, and defendants cannot determine their veracity without discovery.

4. Defendants do not dispute the possibility that the technologies and services described in this paragraph might emerge at some time in the future.

5. The first sentence is not disputed. Plaintiff's affiant does not identify his source for the statistics stated in the remainder of this paragraph, and defendants cannot determine their veracity without discovery.

6. The FCC does not receive the A. C. Nielson Company's service, which is identified as plaintiff's source for the statistics stated in this paragraph, and therefore cannot determine veracity of these statistics without discovery.

7. Plaintiff's affiant relies upon report(s) by Paul Kagan Associates, Inc. as the source for the statistics stated in this paragraph. Due to the voluminous reports issued by this source, and because plaintiff does not provide a specific citation to its source, defendants are unable to determine the veracity of these statistics without discovery.

8. Defendants do not dispute that currently the supply of available programming exceeds the carriage capacity of cable systems. However, how long into the future this excess of supply over capacity will continue is unknown.

9. Defendants do not dispute that some cable operators might be required to carry broadcast stations as part of their basic cable service that would not otherwise be carried absent the must-carry provisions, and that broadcast stations might also be assigned to cable channels that would not be made available to them absent the Cable Act's channel repositioning requirements. Defendants, however, dispute that plaintiff's proffered testimony establishes that these possible occurrences are either imminent or inevitable.

10. Defendants do not dispute the possibility that cable operators might either deny carriage to cable programs, delete cable programs, or reassign cable programs to different cable channels in order to comply with the must-carry provisions.

11. Defendants do not dispute that it is possible that the inclusion of a program on a cable system's basic service and placement of that program on a lower channel might increase viewership.

12-13. Defendants do not dispute that these paragraphs accurately state the statistics reported in the *Television & Cable Factbook*, Warren Publishing, Services Vol. 60 at G-3 (1992).

14. Because plaintiff's affiant does not provide specific citations to his source in support of the statistics stated in this paragraph, defendants have been unable to verify their accuracy without discovery.

15. Because plaintiff's affiant does not identify his source for the statistics stated in this paragraph, defendants are unable to verify their accuracy without discovery.

16. Because plaintiff's affiant does not identify his source for the statistics stated in this paragraph, defendants are unable to verify their accuracy without discovery. Defendants dispute plaintiff's conclusions drawn from these statistics to the extent that NCTA asserts that the market share shift to cable television has been inconsequential. Cable Act, § 2(a)(13) ("As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television").

17-18. Because plaintiff's affiants do not cite their sources for the statistics stated in these paragraphs, defendants are unable to determine their veracity without discovery.

19. Because defendants do not have access to the source cited by plaintiff's affiant for the proposition that "[t]hirty-four of the more than 1500 U.S. cities served by a daily newspaper are served by two or more dailies under separate ownership," the truth of this assertion cannot be determined without discovery. The remainder of this paragraph is not disputed.

20. Not disputed.

STUART E. SCHIFFER
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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO DISCOVERY COMMUNICATIONS, INC.'S AND THE LEARNING CHANNEL, INC.'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h), defendants hereby respond to plaintiffs Discovery Communications, Inc.'s and the Learning Channel, Inc.'s ("Discovery") statement of material facts allegedly not in dispute. Defendants incorporate by reference their objections made in response to plaintiff Turner Broadcasting System, Inc.'s statement of material facts.

Defendants are otherwise unable to respond to plaintiffs' fact allegations because they have not complied with Local Rule 108(h), requiring that a party's statement of material facts "shall include reference to the parts of the record relied on to support the statement." *Accord, Tarpley* v. *Greene*, 684 F.2d 1, 6 (D.C. Cir. 1982); *Gardels* v. *CIA*, 637 F.2d 770, 773 (D.C. Cir. 1980) (failure to file proper statement under predecessor to Local Rule 108(h) may be fatal to the delinquent party's position). Because plaintiffs have not stated the bases for their fact allegations, defendants are unable to formulate appropriate responses.

Defendants reserve the right to file a response to Discovery's statement of material facts if plaintiff in the future complies with its obligations under Local Rule 108.

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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DECLARATION OF JOHN R. TYLER

Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, I, John R. Tyler, declare as follows:

1. I am the Department of Justice attorney with primary responsibility for the above-captioned cases challenging the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").

2. It is defendants' position in this litigation that plaintiffs' constitutional challenges to the Cable Act's must-carry provisions should be dismissed as a matter of law under Rule 12(b)(6). Defendants rely in support of their dispositive motion upon the Cable Act itself and its legislative history.

3. Plaintiffs have moved for summary judgment on their must-carry challenges, and rely, *inter alia*, upon their respective statements of material facts allegedly not in dispute, submitted pursuant to Local Rule 108.

4. Defendants are unable either to dispute or to admit many of plaintiffs' factual assertions in their statements of material facts. Because plaintiffs in the above-captioned cases, with the exception of Daniels Cablevision, Inc., waited until February 12, 1993 to move for summary judgment on their must-carry challenges, defendants were precluded from possibly obtaining any relevant discovery for purposes of determining the truth of many of the factual allegations on which plaintiffs rely.

5. More importantly, it is defendants' position in this litigation that plaintiffs' fact allegations do not constitute "material facts" within the meaning of Rule 56(c) of the Federal Rules of Civil Procedure. *See* Defendants' Response to Turner Broadcasting System, Inc.'s Statement of Material Facts (setting forth defendants' objection to the acceptance of plaintiffs' fact allegations as material facts).[1] Defendants respectfully submit that plaintiffs' facial challenges must be adjudicated on the basis of the legislative record, and not pursuant to a separate record generated during the course of judicial proceedings. *Id.* For this reason, defendants have not sought discovery in order either to rebut plaintiffs' proffered factual allegations or to put into the record affirmative evidence in further support of the Cable Act's must-carry provisions.

6. For the foregoing reasons, in the event that the Court intends to treat plaintiffs' fact allegations as "material facts" and to judge the constitutionality of the must-carry provisions on the basis of a "trial-type" record, defendants respectfully reserve the opportunity to contest plaintiffs' allegations either through Rule 56(f) discovery or by the submission of affirmative evidence on behalf of the government.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 25th day of February 1993.

/s/ John R. Tyler
JOHN R. TYLER

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[1] *See also*, Defendants' Reply Memorandum in Support of their Motion to Dismiss and in Opposition to Plaintiffs' Motions for Summary Judgment at 16-17.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO DISCOVERY COMMUNICATIONS' REVISED STATEMENT OF MATERIAL FACTS (MUST-CARRY)

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to Discovery Communications' Revised Statement of Material Facts with respect to plaintiffs' must carry claims.

The public broadcasters assert that none of the facts asserted by Discovery are material to plaintiffs' facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (1992) (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiffs' affidavits as material facts going to the merits of plaintiffs' motion for summary judgment, the public broadcasters would need to test those allegations through discovery. There has, however, been

no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiffs' averments in its Revised Statement of Material Facts As To Which There Is No Genuine Issue.

1-4. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

5. The public broadcasters do not dispute that the Discovery Channel "competes directly with over-the-air broadcasting," but respectfully refer the Court to the 1992 Cable Act, where Congress found that free local broadcasting cannot now compete on equal terms with cable programmers (like Discovery) that have preferred access to cable systems. *See* 1992 Act § 2(a)(13)-(16).

6. The assertions that (1) "substantial changes" were made to the Learning Channel after October 1991 and (2) that the Learning Channel "usually competes" for channel space are too vague and unsubstantiated to require a response. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

7-9. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act. The public broadcasters also note that the

assertions contained in paragraph 7 are not supported by the cited portions of the record.

10. The first sentence of this paragraph is too vague to require a response. In any case, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in this sentence and the rest of this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

11. The first two sentences of this paragraph contain vague conclusory statements and speculation, not statements of fact to which a response is required. With respect to the third sentence, and to the extent that the first two sentences contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

12. The first sentence of this paragraph contains a vague characterization, not a statement of fact to which a response is required. The public broadcasters do not dispute the second, third, and fourth sentences of this paragraph. The fifth sentence of this paragraph is a characterization of the law governing broadcast television, to which no response is required.

13. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in the first two sentences of this paragraph, but have no reason to dispute these allegations. With respect to the third sentence of this paragraph, the public broadcasters would need to conduct discovery to test the truth of these allegations, but refer the Court to other parties' submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical

scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system). Further, the third sentence of this paragraph is not based on personal knowledge and is thus inadmissible for summary judgment purposes.

14. This paragraph contains a characterization of the 1992 Cable Act, not a statement of fact to which a response is required. The public broadcasters respectfully refer the Court to the Act for an accurate statement of its provisions.

15. The first and third sentences of this paragraph contain assertions that are not based on personal knowledge, therefore no response is required. The second sentence of this paragraph contains a characterization of the 1992 Cable Act, and the Court is respectfully referred to the statute for an accurate statement of its provisions. To the extent that this paragraph contains statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but refer the Court to other parties' submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

16. The assertions contained in this paragraph are speculative and unsubstantiated contentions about the fu-

ture effect of the 1992 Cable Act, not statements of fact to which a response is required. To the extent that this paragraph contains statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

17. The first two sentences of this paragraph contain vague and unsubstantiated allegations, not factual assertions to which a response is required. With respect to the third sentence, and to the extent that the first two sentences contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

18. The paragraph contains vague, conclusory, and speculative allegations about the effect of the 1992 Cable Act, not assertions of fact to which a response is required. To the extent that this paragraph contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

19. The first sentence of this paragraph contains a characterization of the effect of the 1992 Cable Act, not a statement of fact to which a response is required. The second and third sentences of this paragraph are not supported by the cited declarations: the cited portions of the Goodwyn Declaration are inadmissible hearsay, and the cited portions of the Caldwell Declaration reflect "recommend[ation]" not to carry The Learning Channel "based on all the usual business considerations," not a final decision directly attributable to the Cable Act. In any event, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

20. The allegations contained in this paragraph are not supported by affidavits containing admissible evidence, but rather by inadmissible hearsay. Further, the second sentence of this paragraph contains only speculative and contingent assertions, not statements of fact to which a response is required. In any event, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

21. This paragraph contains a characterization of the 1992 Cable Act, not a statement of fact to which a response is required. The public broadcasters respectfully refer the Court to the Act for an accurate statement of its provisions.

22. This paragraph contains numerous vague and speculative allegations, not statements of fact to which a response is required. In any event, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

23. This paragraph contains a characterization of the effect of the 1992 Act, not a statement of fact to which a response is required. The public broadcasters also deny that the "discretion" exercised by cable operators in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. The statements and affidavits of other plaintiffs in this action, *see Turner* Gardner Aff. ¶ 5-6, TWE Statement of Facts ¶ 8, *TWE* Collins Aff. ¶¶ 13, 16-17, 60, demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial. To the extent that this paragraph contains factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not

material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

24. This paragraph contains a characterization of the 1992 Cable Act, not a statement of fact to which a response is required. The public broadcasters respectfully refer the Court to the Act for an accurate statement of its provisions.

25. The public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, the allegations are not material to a plaintiffs' facial challenge to Section 5 of the 1992 Act. The public broadcasters also refer the Court to other parties' submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff.¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

26. The paragraph contains vague, conclusory, and speculative allegations about the effect of the 1992 Cable Act, not assertions of fact to which a response is required. To the extent that this paragraph contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-A798

TURNER BROADCASTING SYSTEM, INC., *et al.*
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*
Appellees.

DECLARATION OF MARILYN MOHRMAN-GILLIS

I, Marilyn Mohrman-Gillis, state as follows:

1. I am the General Counsel for the Association of America's Public Television Stations (APTS).

2. In my capacity as General Counsel, I have supervised the collection of information regarding attempts of noncommercial educational (NCE) stations throughout the country to exercise their carriage rights under Section 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act or Act).

3. Since December 4, 1992, when Section 5 of the Act became effective, at least 44 NCE stations have requested carriage on 411 cable systems. This figure does not include NCE stations that have not advised APTS of their requests for carriage as well as stations that may be eligible for carriage but have refrained from requesting carriage.

4. To date, no cable system has begun carriage of any of the 44 NCE stations that have requested carriage.

5. The 411 cable systems on which the NCE stations have requested carriage serve at least 5.5 million subscribers. This number is derived from the Television and Cable Fact Book (Warren Publishing, Inc. 1992), which reports the number of subscribers to each cable system.

6. Since December 4, 1992, most of these 5.5 million subscribers have been denied access to the noncommercial educational program services offered by the public television stations that have been denied carriage. While it is technically possible for many (but not all) cable subscribers to receive over-the-air signals, Congress has found that "[m]ost subscribers to cable television systems do not or cannot . . . receive broadcast television services," 1992 Cable Act, § 2(a)(17).

7. The grant of injunctive relief pending appeal requested by the applicants in this proceeding will harm the public interest by:

> (a) continuing to deprive some 5.5 million cable subscribers of access to the noncommercial educational program services offered by the stations that have requested, but been denied carriage; and
>
> (b) frustrating Congress' intent in the 1992 Cable Act of ensuring that cable subscribers have access to noncommercial education program services; *see* 1992 Cable Act, § 2(a)(7).

8. The denial of carriage also has an adverse effect on the financial viability of NCE stations. Twenty-three percent of the income of public television stations is from contributions by individual supporters. Public television stations obtain individual contributions from viewers through pledge drives that are generally broadcast three times annually (December, March and August). Denial of carriage on cable systems diminishes the ability of NCE stations to reach potential contributors during the stations' pledge drives.

9. An additional twenty-one percent of the income of public television stations is from underwriting contributions from foundations and businesses for educational programs. The ability of NCE stations to maintain this funding and attract additional foundation and business support is related to the breadth of reach of the stations' educational program services. The denial of access to additional cable subscribers reduces the stations' ability to maintain and increase foundation and business support.

10. The injunctive relief pending appeal requested by the applicants in this proceeding will harm NCE stations that are not carried by cable systems by:

(a) depriving them of the opportunity to obtain support from viewers who subscribe to the cable systems that have declined to carry NCE stations, resulting in loss of additional income through private contributions; and

(b) depriving them of the opportunity to maintain and attract additional foundation and business support by virtue of the expanded reach of their educational services.

11. Since December 4, 1992, the effective date of Section 5 of the 1992 Cable Act, at least 9 NCE stations carried by cable systems have been repositioned, against their will, from one channel to another. This figure does not include NCE stations that have not advised APTS of their repositioning. Under the terms of the injunction sought by applicants, these repositioned stations would be unable to exercise their rights under Section 5(j) to challenge the repositioning.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of April 1993.

/s/ Marilyn Mohrman-Gillis
MARILYN MOHRMAN-GILLIS